Supreme Court, U.S.
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No. 95-386

In The

Supreme Court of the United States

October Term, 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

EDWIN A. STRICKLAND
JEFFREY M. SEWELL
CHARLES S. WAGNER,
Counsel of Record
Jefferson County Attorney's Office
214 Jefferson County Courthouse
716 North 21st Street
Birmingham, Alabama 35263
(205) 325-5688

Attorneys for Respondent Jefferson County, Alabama

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the Alabama Supreme Court correctly hold that Petitioners' constitutional challenges to Act 406 and Ordinance 1120 are barred by *res judicata*?

A. Are Petitioners in privity with the earlier plaintiffs in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988)?

B. Are the causes of action in the instant case and in the earlier *Bedingfield* case substantially the same?

CERTIFICATE OF INTERESTED PERSONS

Respondent's Counsel	Edwin A. Strickland Jeffrey M. Sewell Charles S. Wagner
Intervenor's Counsel	William Slaughter Charlie D. Waldrep Thomas L. Stewart
Petitioner's Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority (BJCC)
Petitioners	Jason Richards Fannie Hill A putative class of taxpayers
Trial Judge	Honorable John Rochester
Supreme Court of Alabama:	Honorable Sonny Hornsby Honorable Hugh Maddox Honorable Reneau Almon Honorable Janie Shores Honorable J. Gorman Houston Honorable Mark Kennedy Honorable Kenneth Ingram Honorable Ralph Cook Honorable Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinions and judgments delivered in the courts below are contained in the appendix to this brief.

STATEMENT OF GROUNDS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 in that this is a petition for certiorari from a decision of the Supreme Court of Alabama in a civil case. However, the jurisdictional requirement set forth at Supreme Court Rule 10(c), is not satisfied. That is because the decision of the Alabama Supreme Court in the instant case does *not* conflict with applicable decisions of this Court. As set forth in this BRIEF the decision of the Alabama Supreme Court in the instant case is, in all respects, consistent with the applicable decisions of this Court.

STATEMENT OF STATUTES AND ORDINANCES INVOLVED IN APPEAL

This case involves Alabama Act 406 (1967) and Jefferson County Ordinance 1120 which are contained in the appendix to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is the second declaratory judgment action challenging the constitutionality of Alabama Act 406 (Legislature 1967) (hereinafter "Act 406") and Jefferson County Ordinance 1120 (hereafter "Ordinance 1120"). Act 406 authorizes the Jefferson County Commission to levy a County occupational tax on all persons who earn wages in the County who are not required to pay the state business license pursuant to the state business license code, Chapter 12, Title 40, Alabama Code (1975). Ordinance 1120 levies the County occupational tax at the rate of .005 (1/2 of 1%) on all wages earned by persons within the geographic boundary of the County who are not required by the state business license code to pay state business license tax.

II. THE PRIOR SUIT

In October, 1987, the City of Birmingham, Alabama and Hoyt Bedingfield, individually and in his official capacity as the Finance Director for the City of Birmingham, filed suit in state court against Jefferson County, Alabama and the Jefferson County Commission and alleged that Act 406 and Ordinance 1120 violated both the state and federal constitutions and were, therefore, void. The verified complaint stated a cause of action under the Alabama Declaratory Judgment Act, § 6-6-220, Alabama Code (1975); §§ 44, 45, 71, 104, 105, 212, Alabama Constitution (1901); and, the ***equal protection*** and

due process clauses of both the United States and Alabama constitutions. [*Bedingfield* complaint at R.237-243, also contained in the appendix to this brief.]

Also, in October, 1987, Carolyn Phillips, John Rogers and Dale Patton, all individuals, filed a second suit against the Jefferson County Commission in state court and also alleged that Act 406 and Ordinance 1120 violated the ***due process clause, the equal protection clause and the Fourteenth Amendment to the United States Constitution.*** [Complaint at R.245-249, also contained in the appendix to this brief.]

In November, 1987, Phillips, Rogers and Patton amended their complaint to expand their ***federal equal protection and due process claims*** and to add federal civil rights claims pursuant to 42 U.S.C. § 1983 and § 1988. [Amended Complaint at R.250-255, also contained in the appendix to this brief.]

The cases were consolidated and were tried in December, 1987. Final judgment was entered in favor of the County on December 11, 1987. [Final Order at R.265-269.]

The consolidated cases were appealed to the Alabama Supreme Court. In their brief, the *Bedingfield* plaintiffs argued that Act 406 and Ordinance 1120 violated the federal constitution. [Excerpts of *Bedingfield* briefs at R.271-283, also contained in the appendix to this brief.]

The Alabama Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers' International Union of North America, Local 1317, and Shelby County, Alabama.

All of the amicus briefs asserted federal equal protection challenges against the occupational tax. [Amicus brief excerpts at R.285-330, also contained in the appendix to this brief.]

On May 20, 1988, the Alabama Supreme Court released its opinion wherein it affirmed the trial court and held that Act 406 and Ordinance 1120 were constitutional. [*Bedingfield* Opinion at R.231-235, also contained in the appendix to this brief.]

The County Commission implemented Ordinance 1120 and has collected the occupational tax from January 1, 1988, to the present. The proceeds of the tax finance thousands of jobs and hundreds of public contracts, including the indebtedness of the Birmingham-Jefferson Civic Center Authority.

III. THE INSTANT SUIT

On April 21, 1992, the instant suit was filed as a class action on behalf of one class of federal employees who are subject to the County tax and one class of all other workers subject to the County tax. The instant suit alleges that the County tax violates the equal protection clause of the federal constitution, several provisions of the Alabama Constitution and, with regard to federal employees, also violates the Buck Act, 4 U.S.C. § 111. [Instant Complaint at R.1-18]

On June 4, 1992, the County moved for summary judgment contending that all the claims (except the federal employees' Buck Act claim) were barred by the doctrine of *res judicata*. Specifically, the County asserted that the *Bedingfield* decision was:

1. A prior judgment on the merits.
2. Rendered by court of competent jurisdiction.
3. That the instant Plaintiffs are in privity with the *Bedingfield* plaintiffs.
4. That the two cases involve substantially the same cause of action.

The County contended that all of the claims which either were raised or *could have been* raised in the *Bedingfield* case are now barred. Since the federal employees' Buck Act claim was the only allegation in the instant suit which was not raised and *could not have been* raised in the prior *Bedingfield* suit, the County contended that it was entitled to summary judgment on all the Plaintiffs' claims except the Buck Act claim of the federal employees.

The trial court entered an order granting summary judgment for the County on the state constitutional claims. The trial court specifically found that the state constitutional claims were "adjudicated" in *Bedingfield* and are now barred by *res judicata*. However, the trial court denied the County's summary judgment on the federal constitutional claims. The trial court specifically found that the federal constitutional claims were not barred by *res judicata* because those claims were not "adjudicated" in *Bedingfield*. [Trial court Order at R.414-415]

The trial court certified its interlocutory order which denied summary judgment on the federal constitutional claims as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Alabama Supreme Court permitted an immediate appeal.

On March 31, 1995, the Alabama Supreme Court released its decision in the instant case reversing the trial court and holding that the instant Plaintiffs are bound by the *Bedingfield* decision. The Alabama Supreme Court specifically found:

> The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned – they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

IV. CORRECTION OF PETITIONERS' MISSTATEMENTS

1. Petitioners falsely stated that the federal constitutional claims in the instant case were not decided by the Alabama Supreme Court in the earlier *Bedingfield* case. In fact, every federal constitutional claim made by Petitioners in the instant case was pled, briefed, argued and rejected by the Alabama Supreme Court in *Bedingfield*.

2. Petitioners falsely described a simple division of a taxing authority between the state and the County as an "exemption scheme". In Act 406 the legislature acknowledged the existence of a state license code and that it applied only to certain identified businesses and occupations. In Act 406, the legislature merely authorized the

County to levy a tax only upon persons who were not already required by law to pay license or privilege tax to the state by reason of the state license code. [See § 3 and § 4, Act 406, contained in the appendix to this brief.] Further, Petitioners falsely state that this simple division of taxing authority between the state and the County could not have been directly challenged by the *Bedingfield* plaintiffs. Clearly, it could have been. However, the County submits that the seven attorneys representing the plaintiffs in *Bedingfield* recognized that it would have been a frivolous argument because the legislature has the clear legal right to divide the license privilege taxing authority between the state and the County and withhold from the County the authority to tax those businesses and occupations already subject to the state business occupational tax.

3. In an attempt to circumvent the jurisdictional considerations of Supreme Court Rule 10(c), Petitioners falsely stated that the decision of the Alabama Supreme Court in the instant case conflicts with applicable decisions of this Court. Specifically, Petitioners falsely stated that this Court's opinion in *Martin v. Wilkes*, 490 U.S. 755 (1989), stands for the proposition that, under no circumstances, can a non-party be bound by a judgment. In fact, at footnote 2 of the *Wilkes* opinion, this Court expressly recognized that a non-party may be bound by an earlier judgment where his interests were adequately represented by someone with the same interest who is a party. As demonstrated in this brief in opposition, Petitioners' interests are identical to the interests of the multiple *Bedingfield* plaintiffs and those interests were adequately

represented by the seven attorneys who challenged the County tax in *Bedingfield*.

SUMMARY OF THE ARGUMENT

In 1987 the Act and Ordinance at issue in the instant case were challenged in state court on the identical federal constitutional claims made by Petitioners in this case. The Act and the Ordinance were declared constitutional by the trial court and the Alabama Supreme Court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988).

In reliance on the Alabama Supreme Court's declaration that the Act and Ordinance were constitutional, the County, in 1989, pledged twenty annual payments of Ten Million Dollars of occupational tax proceeds to the Birmingham-Jefferson Civic Center Authority (BJCC) for repayment of certain bonds issued by BJCC for improvements to the Civic Center complex located in Birmingham, Alabama.

In 1992, Petitioners filed the instant suit seeking to relitigate the same federal constitutional challenges raised and rejected by the Alabama Supreme Court in the earlier *Bedingfield* case. The Alabama Supreme Court correctly held that the cause of action in both cases is substantially the same and that Petitioners are in privity with the earlier plaintiffs. The Alabama Supreme Court correctly held that Petitioners' interests in the instant case are identical to the interests of the earlier plaintiffs; and, that those interests were adequately represented by seven attorneys who challenged the Act and Ordinance on the same federal constitutional grounds in the earlier case.

The Alabama Supreme Court correctly determined that this suit is barred by *res judicata*.

Petitioners now attack the doctrine of *res judicata* itself. Petitioners urge this Court to establish a new definition of *res judicata* which would recklessly narrow the scope of the doctrine by deleting the concept of privity and substituting a requirement that only an actual party may be bound by a prior judgment. Petitioners also urge this Court to further narrow the scope of *res judicata* by holding for the first time that *res judicata* does not bar claims which could have been but were not actually litigated in an earlier case.

The County submits that Petitioners' arguments are frivolous and that, if adopted, their proposed new definition of *res judicata* would effectively eliminate the defense. As a result of such a decision, the constitutionality of a statute could never be settled. The declaratory judgments of the courts would be reduced to being non-binding and merely advisory in nature.

The County submits that the law of *res judicata* is so well established and so fundamental, that this case needs no review by this Court. The County urges this Court to decline review of this case.

ARGUMENT

RES JUDICATA LAW OF THIS COURT

This Court has held that, under the doctrine of *res judicata* a final judgment on the merits binds parties and

their *privies* on the same cause of action.[1] *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (federal government in privity with individual contractor and therefor barred from relitigating constitutionality of state tax statute); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (Plaintiff in privity with federal Securities and Exchange Commission); *see generally United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 71 L.Ed.2d 509 (1983); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

In *Allen v. McCurry, supra*, this Court also recognized that *res judicata* bars not only those claims which were actually litigated, but also bars all claims which *could have been* litigated in the prior suit. In *Nevada v. United States, supra*, this Court held:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case "[i]t is a finality as to the claim or demand in controversy, concluding parties *and those in privity with them*, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose*. (citations omitted) (emphasis added).

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[1] This Court has explained that "[the doctrine of res judicata] serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *United States v. Mendoza*, 46 U.S. 154, 158 *citing Allen v. McCurry*, 449 U.S. at 94.

463 U.S. at 129, 130, *citing Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876).

RES JUDICATA LAW OF ALABAMA

In a series of decisions the Alabama Supreme Court has implemented the doctrine of *res judicata* in a manner completely consistent with the foregoing decisions of this Court. The Alabama Supreme Court has held that the elements of the defense of *res judicata* are:

(1) A prior judgment on the merits;

(2) Rendered by a court of competent jurisdiction;

(3) Substantial identity of the parties (i.e. privity); and

(4) Substantially same cause of action.

Dairyland Insurance Company v. Jackson, 566 So.2d 723 (Ala. 1990); *Garris v. South Alabama Production Credit Association*, 537 So.2d 911 (Ala. 1989); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978).

The Alabama Supreme Court has established the following test to determine whether "privity" exists:

> Privity is defined as a relationship between one who is party of record and a non-party that is sufficiently close so a judgment for or against the party should bind or protect the non-party. Privity exists where the non-party's interests were represented adequately by the party in the original suit. Privity also exists where a party to the original suit is so closely aligned to a non-party's interest as to be his virtual representative.

NAACP v. Hunt, 891 F.2d at 1560, citing, *United Merchants and Manufacturers v. Sanders*, 508 So.2d 689 (Ala. 1987); *Dairyland Insurance Company v. Jackson*, 566 So.2d 723 (Ala. 1990); *Whisman v. Alabama Power Co.*, 512 So.2d 78 (Ala. 1987).

Following *Allen v. McCurry, supra*, the Alabama Supreme Court has ruled that *res judicata* bars not only those claims actually litigated in an earlier case, but also bars all claims which *could have been* litigated. That is, *res judicata* is a defense not only to the precise legal theory presented in the prior case, *but to all legal theories and claims arising out of the same nucleus of operative fact. Dairyland Insurance Company v. Jackson, supra; Hughes v. Allenstein*, 514 So.2d 858 (Ala. 1987); *Whisman v. Alabama Power Co., supra; Dominick's, Inc. v. Key*, 456 So.2d 1047 (Ala. 1984); *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Commission*, 401 So.2d 764 (Ala. 1981); *Adams v. Powell*, 225 Ala. 300, 142 So. 537 (1932).

The Alabama Supreme Court's test to determine whether two suits involve substantially the same cause of action is whether the same evidence would support a recovery in both suits. *Garris v. South Alabama Production Credit*, 537 So.2d 911 (Ala. 1989); *Dominick's, Inc. v. Key*, 456 So.2d 1047 (Ala. 1984); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978). In *Garris*, the Alabama Supreme Court held:

> Regardless of the form of the action, the issue is the same when it is supported in both actions by substantially the same evidence. If it be so supported, a judgment in one action is conclusive upon the same issue in any suit, even if the cause of action is different.

537 So.2d at 914.

APPLICATION OF *RES JUDICATA* LAW TO THIS CASE

1. PRIOR JUDGMENT ON THE MERITS

As more fully described in the STATEMENT OF THE CASE this is the **second** federal constitutional challenge to the County tax. In, 1987 before the tax was implemented, the County was sued in state court by two separate groups of plaintiffs (i.e. the *Bedingfield* plaintiffs). The complaints of the *Bedingfield* plaintiffs contained the same federal constitutional challenges as in the instant suit. [*Bedingfield* complaints contained in the appendix to this Brief]. The cases were consolidated, tried and judgment was entered holding the Act and Ordinance constitutional. The case was appealed by the *Bedingfield* plaintiffs to the Alabama Supreme Court.

On appeal the state Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers International Union of North America, Local 1317 and Shelby County, Alabama. All of the amicus briefs asserted federal equal protection challenges against the Act and Ordinance. [Amicus brief excerpts contained in the appendix to this Brief.]

On May 20, 1988, the Alabama Supreme Court released its opinion now published as *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). The Alabama Supreme Court affirmed the trial court and held that Act 406 and Ordinance 1120 were constitutional. [*Bedingfield* opinion contained in the appendix to this brief.]

The prior judgment on the merits of Act 406 and Ordinance 1120 by the state trial court and the Alabama Supreme Court satisfies the first element of *res judicata*.

2. COURT OF COMPETENT JURISDICTION

It is axiomatic that the Alabama Supreme Court had jurisdiction over the *Bedingfield* case. Therefore, the second element of *res judicata* is satisfied.

3. SUBSTANTIAL IDENTITY OF THE PARTIES (PRIVITY)

Petitioners are raising the issue of privity for the first time before this Court. The trial court necessarily found the existence of privity between petitioners and the *Bedingfield* plaintiffs by holding that *some* of their claims were barred by *res judicata*. The trial court entered summary judgment in favor of the County on the petitioners' state constitutional claims expressly holding that those claims were barred by *res judicata*. For any claim to be barred by *res judicata* the trial court had to find the existence of privity. Petitioners made no issue of that holding with the trial court and did not cross-appeal that issue to the state Supreme Court. The County submits that petitioners have effectively waived the privity issue. Nevertheless the following is submitted to demonstrate that the trial court and the Alabama Supreme Court correctly determined that petitioners are in privity with their predecessors, the *Bedingfield* plaintiffs.

Application of the three elements of the Alabama test for privity to the facts of this case demonstrates that

Petitioners are in privity with the *Bedingfield* plaintiffs. If the *Bedingfield* plaintiffs had prevailed in the earlier case, the County tax would have been declared unconstitutional. The County would have been enjoined from collecting the tax. Petitioners would be protected from subsequent attempts by the County to collect the tax. The County would be bound by the earlier judgment invalidating the tax. Accordingly, the first element of the privity test is satisfied because the relationship between the *Bedingfield* plaintiffs and Petitioners is "sufficiently close so a judgment for or against the party should bind or protect the non-party".

The second element of the privity test requires that the interests between the party and non-party be "closely aligned". The "interests" of the *Bedingfield* plaintiffs and Petitioners are **identical**. Indeed, all of the taxpayers have identical legal interests under the federal constitution with respect to the County tax. The equal protection interest of Carolyn Phillips is no different from that of Jason Richards with respect to the County tax. Both sets of plaintiffs have the identical goal – to invalidate the tax. Both sets of plaintiffs made identical legal challenges to achieve that goal. With identical interests among petitioners and their predecessors in litigation, it is clear that the second test for privity is satisfied.

The third element of the privity test requires that the non-party's interests were adequately represented in the earlier case. Seven attorneys briefed and argued the plaintiffs' federal constitutional claims and other claims

to the Alabama Supreme Court.[2] Examination of the *Bedingfield* appellate brief excerpts [contained in the appendix to this Brief] reveals that *all of the claims in this case* (except the Buck Act claim) *were briefed, argued, considered and* ***REJECTED*** *by the Alabama Supreme Court*. Certainly, representation by seven attorneys is adequate to satisfy the third element of the privity test.

With the substantial identity between petitioners and the *Bedingfield* plaintiffs (i.e., privity) the third element of *res judicata* is satisfied.

4. SUBSTANTIALLY SAME CAUSE OF ACTION

As noted above, the Alabama test to determine whether two causes of action are substantially the same is whether the same evidence supports a recovery in both cases. The ultimate issue in this case and in *Bedingfield* are the same, that is, whether Act 406 and County Ordinance 1120 are constitutional. The evidence needed to prove a constitutional violation is the same today as it was when *Bedingfield* was decided. The evidence available to the instant Plaintiffs is identical to the evidence available to the *Bedingfield* plaintiffs. The Act has not been amended. The Ordinance has not been amended. The collection procedures of the County have not changed. The rate of taxation has not changed. Those subject to the tax have not changed. The claims of the Plaintiffs have not

[2] Seven attorneys filed briefs in opposition to the County tax. Those attorneys include Donald Watkins, Joe Whatley, David Sullivan, Samuel Fisher, Guy Tipton, William Tillery and Frank Ellis.

changed. The only change is the name of the plaintiffs' lawyers.

Because the evidence necessary to support both claims is identical, it is axiomatic that the fourth element of *res judicata* is satisfied. Both cases involve substantially the same cause of action.

Moreover, all of the claims raised by the instant Plaintiffs (except the Buck Act claim) were actually raised by the *Bedingfield* plaintiffs and were briefed and argued to the Alabama Supreme Court [*Bedingfield* appellate brief excerpts contained in the appendix to this Brief]. In fact, the *Bedingfield* brief squarely raised the equal protection issue as follows:

> II. If Act No. 406 were construed as authorizing an occupational tax, then:
>
> a. Is the act constitutional local legislation in light of the general laws governing the same subject?
>
> b. **Does the Act No. 406 comply with principles of equal protection?**

[Record at 272]

Closer examination of the text of the *Bedingfield* brief illustrates that the drafter chose to frame the equal protection issue by asserting that the population classification of Act 406 lacked a reasonable relationship with the statute's purpose (i.e., there was no rational basis for only large counties having an occupational tax). The Alabama Supreme Court responded to and rejected that argument beginning in the fifth paragraph on page 272 of Volume 527 of the Southern Reporter, Second Series. Alabama

Supreme Court Justice Sam Beatty devoted nearly a page and a half to the equal protection issue. In so doing, he relied upon *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), involving a similar equal protection challenge to a local law. The foregoing proves that an equal protection challenge to Act 406 and County Ordinance 1120 was raised by *Bedingfield*, was argued to the trial court, was briefed to the Alabama Supreme Court, was argued to the Alabama Supreme Court and was **REJECTED** by the Alabama Supreme Court.

Nevertheless, it really makes no difference whether the federal constitutional claims were previously adjudicated in *Bedingfield*. Clearly, they *could have been* adjudicated. That is all the law requires.

PETITIONERS HAVE HAD ALL THE PROCESS THEY ARE DUE

Due process entitles one to a remedy. It does not guarantee the outcome. It does not guarantee successive opportunities to relitigate the same subject matter until one finds the "right" judge. Petitioners' privies had the Act and Ordinance analyzed under the framework of the federal constitution by the highest court in Alabama in 1988. They were adequately represented by seven attorneys. They had their remedy and they lost. That is all the process they are due.

Petitioners now attack the doctrine of *res judicata* itself. They now claim due process effectively prohibits any court from ever finally deciding the constitutionality of a statute. Under the guise of due process, Petitioners urge this Court to recklessly narrow the scope of *res judicata* by eliminating the concept that one in privity with an earlier party is bound by the judgment on the merits in that case.[3] Also under the guise of due process petitioners urge this Court to further narrow the scope of *res judicata* by eliminating the concept that the doctrine bars claims which *could have been* but were not raised in the earlier case. That is, under the guise of "due process" petitioners urge this Court to adopt a new definition of *res judicata* which would effectively render meaningless the declarations of this Court and every other court in cases such as this which involve the constitutionality of a statute.

If this Court adopted Petitioners' definition of *res judicata* the constitutionality of a statute could never be settled. Declaratory judgments of the courts would mean nothing. They would be reduced to being merely advisory in nature. No one could rely on the judgment. Parties who lost could simply reword their claim and refile their suit. Non-parties could also relitigate even though they were in privity with the losing party. The due process right of the citizen would overcome and destroy the usefulness of the courts in deciding controversies.

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[3] Petitioners are, in effect, suggesting that class action status should be adopted as an element of *res judicata*. That would eliminate the concept of a non-party being bound by a judgment. Of course, the constitutionality of a statute could never be finally decided within this framework, at least not until every citizen who might some day be affected was identified and served with a summons and complaint. One wonders how the County would identify, locate and serve every possible future taxpayer.

This case is the classic example of the illogic of Petitioners' position. At present, there are an estimated 600,000 County taxpayers. According to Petitioners, privity does not exist, therefore, the only way to finally decide the constitutionality of the tax would be to identify, locate, serve and make all taxpayers and future taxpayers actual parties to this case (i.e., class action). Of course that was impossible in 1987. It is impossible today.[4]

When the *Bedingfield* suit was filed in 1987 the tax had not been implemented. There were no taxpayers. Because the tax was employer withheld there was no way for the County to identify every taxpayer. Therefore, according to Petitioners' reasoning, a class action in *Bedingfield* would have been ineffective to finally settle the constitutionality of the Act and Ordinance. Likewise, when the instant suit was filed in 1992 it was impossible for the County to identify, locate and serve every potential future taxpayer. Hundreds, perhaps thousands of new residents go to work in Jefferson County each year. According to petitioners, those new residents would not be bound by a judgment on the merits of this case! That is because they were not actual parties to this case. They would be free to litigate the same federal constitutional claims decided in this case and decided earlier in *Bedingfield*. Even with two class action victories the County

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[4] According to Petitioners' view of *res judicata* even the *Bedingfield* plaintiffs would not be bound by the earlier judgment. They could reword their equal protection challenge and file suit again, and again, and again until they find a judge who will invalidate the tax.

would never be able to rely on any court's declaration that the tax is constitutional.

THE COUNTY RELIED ON THE *BEDINGFIELD* DECISION

The consequence of adopting Petitioners' definition of *res judicata* would be a County government in a perpetual state of uncertainty about its revenue sources, unable to incur debt or contract for public improvements because there would be no certainty of payment. That consequence would frustrate this Court's stated purpose of *res judicata* in *Allen v. McCurry, supra,* where this Court held that one of the public policy reasons supporting the doctrine of *res judicata* was to encourage reliance on adjudication by preventing inconsistent decisions. 449 U.S. at 94.

The Alabama Supreme Court recognized and followed the spirit and the letter of *Allen v. McCurry* noting:

> The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the Civic Center. The motion continues:
>
> > "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the occupational tax at issue in this matter to the BJCC for repayment of the series 1989 and series 1989B Capital Outlay

> Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00 beginning in the year 1989 and ending in the year 2008.

In 1989, the county and the authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the holders.

Jefferson County, et al. v. Jason Richards, et al., [opinion contained in appendix to this brief].

The County submits that it was entitled to rely and did rely on the *Bedingfield* decision which held Act 406 and Ordinance 1120 constitutional. To allow Petitioners to relitigate the identical claims that were decided in *Bedingfield* would subvert the very public policy reasons supporting *res judicata* which were identified by this Court in *Allen v. McCurry, supra.*

ACT 406 DOES NOT CREATE AN EXEMPTION SCHEME

Petitioners make the false statement that the *Bedingfield* plaintiffs could not have challenged the "exemptions" from the occupational tax. What Petitioners have falsely described as an "exemption scheme" is actually a

division of taxing authority between the state and the County.

In Act 406, the legislature acknowledged the existence of a state license code and that it applied only to certain identified businesses and occupations, and declared:

> Section 3. The purpose of this act [406] is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or the county.

The legislature then authorized the County to levy a tax only upon persons who were not already required by law to pay any license or privilege tax to either the state or the County by reason of the state license code:

> Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article I, Chapter 20, Title 51; §§ 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826, and Title 51 of the Code of Alabama of 1940, as amended.

This simple division of taxing authority between the state and the County could have been directly challenged by the *Bedingfield* plaintiffs. The County submits that the seven *Bedingfield* attorneys recognized that it was frivolous, and elected not to focus their case on a frivolous matter. The seven *Bedingfield* attorneys recognized that the state legislature has the clear right to divide the

license privilege taxing authority between the state and the County and withhold from the County the authority to tax those businesses and occupations already subject to the state business occupational tax.

CONCLUSION

Petitioners recklessly urge this Court to limit the doctrine of *res judicata* by holding that *res judicata* cannot bind a non-party. In effect, Petitioners urge this Court to eliminate the concept of privity. The County submits that such a narrow view of *res judicata* would result in the collapse of the judicial system. The constitutionality of a statute would never be finally settled. If there was ever a public policy reason to bind a non-party, it must surely be in a case such as this which involves the constitutionality of a tax statute. To hold otherwise would paralyze government.

The Alabama Supreme Court correctly applied the law of *res judicata* to the facts of this case. The Alabama Supreme Court correctly determined that the Petitioners' interests and constitutional claims relating to the County tax are identical to those of the *Bedingfield* plaintiffs and that those interests and claims were adequately represented by the seven *Bedingfield* attorneys. The Alabama Supreme Court correctly held that those claims were or could have been adjudicated in *Bedingfield* and are now barred by *res judicata*.

The County urges this Court to deny the petition for certiorari.

Respectfully submitted,

EDWIN A. STRICKLAND
JEFFREY M. SEWELL
CHARLES S. WAGNER,
Counsel of Record
Jefferson County Attorney's Office
214 Jefferson County Courthouse
716 North 21st Street
Birmingham, Alabama 35263
(205) 325-5688

Attorneys for Respondent
Jefferson County, Alabama

APPENDIX

AN ACT

To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms shall have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in

certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as

to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama,

within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centrum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and

each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and

returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employees for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall

be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each Such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he

believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after

they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly

make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period then thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provisions, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDINGFIELD, JR., individually and in his capacity as Acting Director of Finance of the City of Birmingham, and THE CITY OF BIRMINGHAM,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	
JEFFERSON COUNTY, ALABAMA, REUBEN DAVIS, JIM GUNTER JOHN KATOPODIS, CHRIS McNAIR, and DAVID ORANGE in their official capacities as Commissioners of Jefferson County,	)	
Defendants.	)	

VERIFIED COMPLAINT

1. This is a complaint for a declaratory judgment and other equitable relief.

2. This action is brought pursuant to the Alabama Declaratory Judgments Act, *Ala. Code* § 6-6-220 *et seq.* (1975), and Rules 57 and 65, Alabama Rules of Civil Procedure, for a declaratory judgment that Ordinance No. 1120 adopted by the Jefferson County Commission is void or invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County. *Ala. Code* § 6-6-223 specifically authorizes the declaratory judgment

with respect to such statutes and ordinances. Plaintiffs allege that there is presently uncertainty and insecurity as to the rights and legal relations of the parties, as to the matters at issue in this action, and that a declaratory judgment is needed to determine those rights and legal relations.

3. Venue is proper in this Court.

4. Attached hereto as Appendix "A" is Ordinance No. 1120 adopted by the Jefferson County Commission on or about the 29th day of September, 1987 to be effective January 1, 1988. Said ordinance purports to establish a licensed or privileged tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any licensed or privileged tax to either the State of Alabama or the County.

5. It is the well established law in Alabama that county governments lack the authority to impose taxes unless specifically authorized by the Legislature.

6. The defendants or some of them have publicly contended that Ordinance No. 1120 is authorized by Act 406 adopted by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967. A copy of that Act is attached as Appendix "B".

7. During the 1987 regular session of the Alabama Legislature, the defendants recognized that they did not have authority to enact a comprehensive occupational tax like the one purported to be adopted in Ordinance No. 1120, and the defendants, or most of them, had proposed

in the Alabama Legislature House Bill No. 941, purporting to give them the authority to adopt an occupational tax. A copy of that bill is attached as Appendix "C". It failed to pass the Alabama Legislature.

8. If put into effect, Ordinance No. 1120 would have a dramatic effect upon the plaintiffs. First with respect to plaintiff Bedingfield individually, the occupational tax would be taken from his salary. Second, plaintiff Bedingfield, as acting Director of Finance of the City of Birmingham, needs an immediate declaration as to whether Ordinance No. 1120 is valid or constitutional. Plaintiff Bedingfield must take steps immediately to implement a system to withhold taxes from employees of the City under Ordinance No. 1140. If said Ordinance is not valid, then it would be improper for him to withhold the tax from the many employees of the City. Third, and more importantly, the occupational tax would exacerbate the problems faced by the City of Birmingham, and its residents, in attracting and maintaining jobs, especially in light of the strong competition faced by it from areas such as north Shelby County in attempting to recruit jobs, especially higher paying jobs, from the City of Birmingham and into the suburban area of north Shelby County. The effect of Ordinance 1120 would be not only taking jobs from the City of Birmingham but also to erode the tax base and to otherwise harm the City and the residents of the City of Birmingham.

9. Plaintiffs need an immediate determination and a preliminary injunction against the enforcement of Ordinance No. 1120. Without such a determination and preliminary injunction, plaintiffs would suffer irreparable

harm. First, plaintiff Bedingfield and the City of Birmingham will have to incur the cost of establishing and implementing a system to withhold taxes from employees of the City. If the Ordinance No. 1120 is illegal or unconstitutional, then plaintiff Bedingfield and the City of Birmingham would be acting improperly in withholding taxes from employees of the City, and may face claims against them for doing so. If he refuses to withhold, then he faces possible criminal prosecution under § 10 of Ordinance No. 1120.

10. Plaintiffs offer to do equity.

CLAIM ONE

10. Paragraphs 1 through 9 are hereby realleged and incorporated herein.

11. Under Art. IV § 44 and Art. XI § 212 of the Constitution of Alabama of 1901, Ordinance No. 1120 is an unconstitutional effort by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM TWO

12. Paragraphs 1 through 11 are hereby realleged and incorporated herein.

13. Ordinance No. 1120 is not authorized by Act 406 and is therefore an unauthorized attempt by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM THREE

14. Paragraphs 1 through 13 are hereby realleged and incorporated herein.

15. If Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:

A. Act 406 is unconstitutional local legislation under Article IV, §§ 104(15) and 105 of the Constitution of Alabama of 1901.

B. Act 406 is a violation of the equal protection and provisions of the federal and state constitution.

C. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act 406 is unconstitutional under Article IV, § 45 of the Constitution of Alabama of 1901 because the title of the bill is not sufficiently descriptive to support a comprehensive occupational tax and the title is not consistent with the content of the Act.

D. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act No. 106 is unconstitutional under Article IV, §§ 45 and 71 of the Constitution of Alabama of 1901 in that the law contains more than one subject.

E. Act No. 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution.

WHEREFORE, plaintiffs demand judgment against defendants and request this Court:

A. To declare that Ordinance No. 1120 is void, invalid, and unconstitutional and to issue preliminary and final injunctive relief prohibiting the enforcement of said ordinance;

B. To the extent necessary to declare that Act 406 is invalid, void, and unconstitutional and to issue appropriate injunctive relief prohibiting its enforcement;

C. To issue such other and further relief as may be appropriate and necessary under the circumstances.

Respectfully submitted,

/s/ Donald V. Watkins
Donald V. Watkins

WATKINS, CARTER & KNIGHT
Suite 214
500 South 22nd Street
Birmingham, Alabama 35233
205/323-5963

/s/ David A. Sullivan
David A. Sullivan

Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233
205/324-4600

Sam Fisher

City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203
205/254-2369

VERIFICATION

Upon being duly sworn, I, Hoyt Bedingfield, hereby affirm that I have read the foregoing Verified Complaint and it is true and correct to the best of my knowledge, information and belief.

Hoyt Bedingfield

Sworn to and subscribed before me this 19th day of October, 1987.

Notary Public

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY, ALABAMA

CAROLYN PHILLIPS, JOHN ROGERS DALE PATTON	)	
PLAINTIFFS,	)	CASE NO. CV87 504-469 JDC
VS.	)	
THE JEFFERSON COUNTY COMMISSION	)	
DEFENDANT.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v.

Jefferson County Commission and otherwise governed by the general laws of Alabama.

FACTUAL ALLEGATIONS

5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiff avers that Act No. 406 of 1967 is not a general law because of its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to

a shifting class; there must be a possibility of application to other counties within the classification fixed by the statue [sic]. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiffs aver that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.

18. Plaintiff [sic] request an expedited hearing of this matter.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on businesses that, on its effective date, did not pay a license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

2. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of

Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

3. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and is therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

4. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

5. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

6. Enter an Order granting such other relief as the Court may deem proper.

7. Enter an Order taxing cost against Defendant.

Respectfully submitted;

/s/ Ronald L. Spratt
RONALD L. SPRATT
Attorney for Plaintiffs
1400 Bank for Savings Building
Birmingham, AL 35203-4007
(205) 251-7180

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY ALABAMA

CAROLYN PHILLIPS, JOHN ROGERS DALE PATTON	)	
PLAINTIFFS,	)	CASE NO. CV 87 504-469 JDC
VS.	)	
THE JEFFERSON COUNTY COMMISSION	)	
DEFENDANT.	)	

AMENDED AND VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Nov. 4, 1987)

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips, John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v.

Jefferson County Commission and otherwise governed by the general laws of Alabama.

FACTUAL ALLEGATIONS

5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiffs aver that Act No. 406 of 1967 iS not a general law because or its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to

a shifting class; there must be a possibility of application to other counties within the classification fixed by the statue [sic]. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiff avers that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law as required by the Constitution of Alabama and of the United States.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.

18. Plaintiffs request an expedited hearing of this matter.

19. Plaintiffs allege that they are entitled to Attorney fees under 42 U.S.C. 1988 with respect to civil rights claims.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. That this Court award a reasonable Attorney fee to Plaintiffs' lawyers as prevailing parties pursuant to 42 U.S.C. 1988.

2. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on "businesses" that, on its effective date, did not pay license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

3. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

4. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and it therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

5. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

6. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

7. Enter an Order granting such other relief as the Court may deem proper.

8. Enter an Order taxing cost against Defendant.

Respectfully submitted;

/s/ Ronald L. Spratt
RONALD L. SPRATT
Attorney for Plaintiffs
1400 Bank for Savings Building
Birmingham AL 35203-4007
(205) 251-7180

VERIFICATIONS

Upon being duly sworn, I, Carolyn Phillips, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and belief.

/s/ Carolyn Phillips
Carolyn Phillips

Sworn to and subscribed before me this 4th day of November, 1987.

/s/ Nadine B. Porter
NOTARY PUBLIC

Upon being duly sworn, I, John Rogers, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and belief.

/s/ John W. Rogers, Jr.
John Rogers

Upon being duly sworn, I, Dale Patton, hereby affirm that I have read the foregoing Amended and verified Complaint for Declaratory and Injunctive Relief and it is true and correct to the best of my knowledge, information and relief.

/s/ Dale Patton
Dale Patton

Sworn to and subscribed before me this 4th day of November, 1987.

/s/ Nadine B. Porter
Notary Public

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY

/s/ RONALD L. SPRATT
RONALD L. SPRATT

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA IN EQUITY

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS, HOYT BEDINGFIELD, JR. AND THE CITY OF BIRMINGHAM

Donald V. Watkins
WATKINS, CARTER & KNIGHT
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233
205/323-5963

David A. Sullivan
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233
205/324-4600

Joe R. Whatley, Jr.
FALKENBERRY & WHATLEY
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203
205/322-1100

Samuel Fisher
City of Birmingham
600 City Hall
Birmingham, Alabama 35203
205/254-2369

ORAL ARGUMENT REQUESTED

• • •

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the Legislature Intend for Act No. 406 to Authorize Jefferson County to Levy an Occupational Tax?

II. If Act No. 406 Were Construed as Authorizing an Occupational Tax, Then:

A. Is the Act Constitutional Local Legislation in Light of the General Laws Governing the Same Subject?

B. Does the Act No. 406 and the Occupational Tax Adopted by Jefferson County Comply with Principles of Equal Protection?

IV. Even if the County Had the Authority to Levy an Occupational Tax, Does it Have the Authority to Collect the Tax?

* * *

East Brewton Materials, Inc. v. State Department of Revenue, 45 Ala. App. 584, 588, 233 So.2d 751 (Ala. Civ. App. 1970).

II. IF ACT NO. 406 WERE CONSTRUED AS AUTHORIZING ORDINANCE NO. 1120, THEN THE ACT WOULD BE UNCONSTITUTIONAL.

If Act No. 406 were construed broadly enough to authorize an occupational tax, then the Act would be unconstitutional. First, it would violate the limitation on local legislation announced in *Peddycoart v. City of Birmingham*, 354 So.2d 808, 813 (Ala. 1978), which should be applied to this attempt to broaden the intent of Act No. 406. Second, even if Act No. 406 were considered to be proper local legislation, it would violate well established principles of equal protection.

A. The Attempt to Expand the Authority of Act No. 406 to Levy an Occupational Tax Violates the Limitation on Local Legislation.

The County cannot rely upon local legislation to establish an occupational tax. First, this Court's analysis of *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978) should be applied to the County's attempt in 1987 to expand the intent of local legislation to establish an occupational tax. Second, even if this analysis were not applied, the general laws of Alabama have preempted the field of license and privilege taxation to prevent reliance on local legislation.

* * *

B. The Occupational Tax, as Adopted, and Act No. 406 Violate Well Established Principles of Equal Protection.

In the area of statutory grants of authority to municipalities or counties based upon population classifications, there must exist a reasonable relationship between the statute's purpose and the population classification established. If not, the classification will be deemed arbitrary and the statute must fail under Equal Protection scrutiny. *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937); *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978).

In the case here, one does not have to surmise about the possible purpose of Act 406; the *purpose* of the act is quite clearly and simply set out in Section 3 of the act, *viz:*

> "Section 3. The *purpose* of this Act is to *equalize the burden of taxation* by authorizing the county to impose a license or privilege tax *upon persons now engaging in certain businesses without paying any license tax thereon* to either the state or county." (Emphasis inserted)

1967 Ala. Acts 406.

Section 4. goes on to identify those "certain businesses":

> "Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county *by any of the*

following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended." (Emphasis inserted)

1967 Ala. Acts 406.

The obvious purpose of the Act was to reach those businesses that were enjoying a "free ride" by operating within Jefferson County with no obligation to pay business license fees. Under the Act, those businesses could be required to assume tax responsibility comparable to other businesses falling subject to license taxation under the "general laws" set forth within Section 4.

The critical determination for this Court is whether the population classification recited in the statute, (i.e., 500,000 or more) bears any relationship to the statute's purpose, and then further, whether that relationship is a reasonable one. *Peddycoart*, supra.

Unmistakably, the statute's emphasis and direction is focused upon *then-unlicensed businesses*. There is no indication that any need for revenue by Jefferson County supplied any part of the legislative motivation.

The analysis, then, for application of Equal Protection scrutiny, should focus on whether there is a reasonable relationship between taxing previously unlicensed businesses and counties with populations numbering 500,000 or more. We say there is not. There is no articulable distinction, except *bare location* of operation, between unlicensed businesses operating in Jefferson County and those operating in any of the other 66 counties within the state.

• • •

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

HOYT BEDINGFIELD, JR., et al.,	)	
Plaintiffs,	)	CASE NO.
v.	)	87-504-465 JDC
JEFFERSON COUNTY, ALABAMA, et al.,	)	
Defendants.	)	
CAROLYN PHILLIPS, et al.,	)	
Plaintiffs,	)	
v.	)	CASE NO.
THE JEFFERSON COUNTY COMMISSION,	)	CV 87 504-469 JDC
Defendants.	)	

MEMORANDUM BRIEF ON BEHALF OF DEFENDANTS
JEFFERSON COUNTY, ALABAMA, AND
THE JEFFERSON COUNTY COMMISSION

Edwin A. Strickland
County Attorney
213 Jefferson County Courthouse
Birmingham, Alabama 35263
Phone: 325-5688

• • •

SECTION VII. EQUAL PROTECTION

Plaintiffs assert that Act No. 406 violates the equal protection provision of the U. S. Constitution. The test for an equal protection violation is set out in *Jefferson County v. Braswell*, 407 So.2d 115 (1981). The *Braswell* court reviewed a local law setting out special requirements on beer distribution in Jefferson County. The court upheld the law against a § 105, Constitution challenge, a commerce clause challenge, and a due process and equal protection clause challenge. With respect to equal protection the court set forth the following test:

> Any form of state legislation creating discriminating classifications (1) that concern *fundamental constitutional rights*, or (2) whose defining criteria are *inherently suspect*, or (3) that are *unnecessarily restrictive and unreasonably related* to the legislation's purported purpose, is subject to challenge and examination as a denial of equal protection of the law. *Craig v. Boren*, 492 U.S. 90, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977). (Emphasis added.)

The *Peddycoart, supra*, case and the later case of *Crandall v. City of Birmingham*, 442 So.2d 77 (1983), are particularly instructive regarding the court's application of the foregoing test. In *Peddycoart*, the Supreme Court decided that in the future it would apply more restrictive rules to post-*Peddycoart* acts in the determination of statutory challenges based on § 105, Constitution and § 110, Constitution. As set forth in SECTIONS IV AND VI of this Memorandum, the *Peddycoart* court declared

> *Henceforth* when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications

> applicable to it. *With regard to legislation heretofore enacted*, the validity of which is challenged, this court will apply the rules which it has heretofore applied in similar cases. (Emphasis added.)

Although the court stated such new rules for § 105, Constitution, and § 110, Constitution determinations, it actually decided the case upon equal protection grounds. Recall that the court was reviewing a 1915 population bracket act with a minimum population classification of 100,000. As to the challenge that the population classification is not reasonably related to the purpose of the law and permits unequal application, the court recognized the many prior decisions in which the court reasoned that the circumstances of size would bear a reasonable relationship to the purpose of the legislation. However, the Court found no such relation in the city's act. The court noted that the purpose of the act was to provide governmental immunity only to the largest city in the state and stated

> If there is any reasonable relationship between the grant of immunity and the size of its population as denoted by its corporate boundaries we are unable to perceive it. "Judicial ingenuity would exhaust itself in an effort to find any rational basis for the classification it presents.," *City of Birmingham v. Moore*, 248 Ala. 422, 425, 27 So.2d 869, 872 (1946). Such a classification, moreover, arbitrarily denies to citizens the right to pursue against that city remedies for injuries to person and property resulting from the exercise of its governmental functions, while they are free to pursue those same remedies against all others, as we shall show later. This

results in a denial of equal protection of the laws, United States Constitution, Article 14, because it constitutes an irrational difference in the treatment of our citizens, *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); accord, *Comer v. City of Mobile*, 337 So.2d 742 (Ala. 1976).

We hold, therefore, that § 660 is unconstitutional under both the federal and state constitutions. It violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application.

The foregoing analysis in *Peddycoart* is in accordance with the test in *Braswell, supra,* as follows.

Test One: The act under attack concerned "fundamental constitutional rights, i.e., the right to seek redress for damages in the courts – with juries.

Test Two: No finding under Test Two, i.e., there was no "inherently suspect" criteria.

Test Three: The act under attack was unnecessarily restrictive and unreasonably related to the legislation's purported purposes. I.e., no conceivable reasonable relationship between the grant of immunity and the size of the population of the municipality.

A similar analysis of *Crandall v. City of Birmingham, supra,* in light of the *Braswell* equal protection test, reflects the following. In *Crandall,* the court had under attack another section of the same act that was attacked in *Peddycoart* (Act No. 257, Legislature 1915). The challenged section prohibited suits for recovery against the city (100,000 population) unless within *90 days* of injury a

sworn statement of claim was filed with the city. In all other municipalities in the state of Alabama the limitation period for the presentation of claims against a municipality is *six months* from the date of injury. The court reconfirmed the legitimacy of local legislation and quoted favorably from *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70-71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978)

The Fourteenth Amendment does not prohibit legislation merely because it is special or limited in its application to a particular geographical or political subdivision of the state. *Fort Smith Light Co. v. Paving Dist.*, 274 U.S. 387, 391 [47 S.Ct. 595, 597, 71 L.Ed. 1112] (1927). Rather, the Equal Protection Clause is offended only if the statutes classification "rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 [81 S.Ct. 1101, 1104, 6 L.Ed.2d 393] (1961); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 556 [67 S.Ct. 910, 912, 91 L.Ed. 1093] (1947).

The *Crandall* court proceeded to look for a rational basis for the statute's classification and stated

We can discern no set of facts within reason which can justify the distinction between Birmingham and all other municipalities in this state. We take judicial notice of the fact that Birmingham is the largest city in the state, exceeding Mobile, the next largest city, by 84,000 people, 1980 census 3rd count. However, we see no connection between the size of a municipality and the need to receive a notice of claim within 90 days instead of six months.

The court observed that Crandall was barred from pursuing his claim because he failed to file it within 90

days, yet it would have been timely filed against any other Alabama city because it was filed within six months of the incident. The court said

> The capriciousness of § 659 is especially evident here because the city, in anticipation of litigation, did investigate fully the claim almost immediately after the incident. The city's contention that it needs to receive notice within 90 days in order to conduct an adequate investigation cannot stand under these facts. Section 659 denies equal protection of the laws of this state and the United States Constitution to persons injured by the fault of the city of Birmingham. (Citing *McGowan v. Maryland, supra,* and *Peddycoart, supra*).

The act was also attacked as violating § 105, and § 110, Constitution. The court referenced *Peddycoart,* and its holding there that the companion section of the same act granting certain immunity to the city was violative of equal protection and in "direct contravention" of a general law on the same subject. The court held that the instant section granting a three-month claim period was also in such "direct contravention" with the general law prescribing a six-month claim period and stated that the only substantive difference between the act and the general law was the time allowed for presentment of the claim. The court stated:

> We are unable to distinguish this case from *Peddycoart v. City of Birmingham,* and, had the constitutionality of § 659 been an issue before this court at the time of that decision it would have been struck down on the same grounds as § 660.

> We hold that 659, a local law, is unconstitutional under Art. IV, § 105, of the Constitution, because it was enacted at variance with an already existing general law on the same subject.

Accordingly, the *Crandall* court similarly applied the *Braswell* equal protection rules as did the *Peddycoart* court. The *Crandall* court found that the companion section to the section attacked in *Peddycoart* providing a three-month claim period was an act

> *Test One:* that concerned *fundamental constitutional rights,* i.e., right to redress in the courts for injuries; and
>
> *Test Three* that it was unnecessarily restrictive and unreasonably related to the legislation's purported purpose, i.e., there was no connection between the size of a municipality and the need to receive a notice of claim within three months instead of six months.

The Act 406 fact situation is completely distinguishable from *Peddycoart* and *Crandall* when tested by the rules of *Braswell.*

> *Test One:* Act 406 does not concern fundamental constitutional rights, i.e., the grant of authority to a county to levy a privilege license tax does not conflict with any right accorded by the Constitution. There is no constitutional freedom from taxation and there is no constitutional right that all counties in the state have to have the same authority to tax. In fact, the opposite is true. As stated in *Eagerton v. Gulas Wrestling Enterprises,* 406 So.2d 366 (1981). "We do note that the power to tax is essentially an attribute of sovereignty confirmed by the people, through the Constitution, on the state, and is vested in

the legislative department." Furthermore, Section 221, Constitution, mandates that the legislature shall not enact any law that takes away the right of counties and cities to impose privilege license taxes. *Peddycoart* and *Crandall* deal with "fundamental constitutional rights" – the right of access to the courts for redress for injuries which is guaranteed by §§ 6, 10, and 11, Constitution of Alabama.

Test Two: Act 406 has no defining criteria that is "inherently suspect," i.e., the defining criteria is "counties of 500,000 population or more." Therefore, the criteria is not based on race, sex, religion, or any other "inherently suspect" criteria.

Test Three: Act 406 criteria is not unnecessarily restrictive and unreasonably related to the legislation's purpose, i.e., the open-ended classification of 500,000 or more has been sustained by numerous Supreme Court decisions as constituting a reasonable general law classification. Under pre-*Peddycoart* rules such classification must be given a liberal interpretation. Moreover, the legislation's purpose, to provide additional revenue, is reasonably related to counties of 500,000 population. Mrs. Cooper's testimony overwhelmingly confirmed the correlation between counties of 500,000 and the needs and demands for services placed upon such counties and the increased cost in highly populated counties of providing services and facilities in response to those demands.

Reference is here made to SECTION II of this Brief and the *Standard Of Review* to be applied in this analysis. Act No. 406 was validly enacted and such enactment was

validated by Amendment No. 389, Constitution. Therefore

> Act No. 406 is presumed to be constitutional, and It is the duty of the court to sustain the constitutionality unless it is *clear beyond a reasonable doubt* that it is in violation of the *fundamental law.*

Additionally, as demonstrated in SECTIONS IV and VI of this Brief, Act No. 406 under pre-*Peddycoart* rules, is a general law of local application and not a local law.

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Alabama AFL-CIO and Public Employees Local Union No. 1317, Laborers International Union of North America move for a leave to file the Amici Curiae Brief which they have submitted to the Court, in support of the appeal in this matter. This motion is based on the following:

1. The amici curiae are the Alabama AFL-CIO and the Public Employees Local Union No. 1317, Laborers International Union of North America. As more fully described below, both represent large numbers of persons who will be affected by the inequitable and unfair tax challenged in this action. Both are employers which will be required to comply with the terms of Ordinance No. 1120.

2. The Alabama AFL-CIO consists of the many local unions affiliated with it and the members of those local unions. In Jefferson County alone, the Alabama AFL-CIO has approximately thirty thousand members almost all of which will have to pay the Jefferson County occupational tax. The members are working people, ranging from laborers and janitors to skilled trades persons. Very few of its members fall within the exceptions to the tax, which allow persons such as highly paid professionals to avoid the tax.

3. The Public Employees Local Union No. 1317, Laborers International Union of North America, consists of approximately seven hundred persons working in Jefferson County. Its members include the nonsupervisory employees of the Street and Sanitation Department and the Park and Recreation Board of the City of Birmingham and the custodial employees of the Birmingham Board of Education. To the best of the knowledge of Local No. 1317, none of its members will qualify for the exceptions to the Jefferson County occupational tax. By and large, the members of Local No. 1371 are paid far less in

wages than are the highly paid professionals who are exempted from the tax.

Respectfully submitted,

/s/ Guy Larry Tipton
Guy Larry Tipton
2501-C 30th Avenue North
Birmingham, Alabama 35207
205/252-8005

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing and has been served upon the following counsel of record by depositing same in the U. S. Mail, postage prepaid, on this the 17th day of December, 1987:

Edwin A. Strickland, Esquire
213 Jefferson County Courthouse
Birmingham, Alabama 35263

Ronald L. Spratt, Esquire
1400 Bank for Savings Building
Birmingham, Alabama 35203-4007

Donald V. Watkins, Esquire
Watkins, Carter & Knight
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233

Joe R. Whatley, Jr., Esquire
Falkenberry & Whatley
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203

David A. Sullivan, Esquire
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233

Samuel Fisher, Esquire
City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203

/s/ Guy Larry Tipton
Guy Larry Tipton

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,

Plaintiffs-Appellants

v.

JEFFERSON COUNTY, ALABAMA, et al.,

Defendants-Appellees.

CAROLYN PHILLIPS, et al.,

Plaintiffs-Appellants,

v.

THE JEFFERSON COUNTY COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

AMICI BRIEF ON BEHALF OF ALABAMA AFL-CIO AND THE PUBLIC EMPLOYEES LOCAL UNION NO. 1317, LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Guy Larry Tipton
2501-C 30th Avenue North
Birmingham, Alabama 35207
205/252-8005

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STATEMENT OF THE CASE

The Alabama AFL-CIO and Public Employees Local 1317, Labor International Union of North America, adopt the Statement of the Case submitted by the appellants.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the Occupational Tax Adopted by the Jefferson County Commission Inequitable in Light of its Many Exemptions, Indicating that it was not Intended by the Legislature and that it Violates Principles of Equal Protection?

STATEMENT OF THE FACTS

These amici curiae adopt the Statement of the Facts of the appellants.

INTEREST OF AMICI CURIAE

The amici curiae are the Alabama AFL-CIO and the Public Employees Local Union No. 1317, Laborers International Union of North America. As more fully described below, both represent large numbers of persons who will be affected by the inequitable and unfair tax challenged in this action. Both are employers which will be required to comply with the terms of Ordinance No. 1120.

The Alabama AFL-CIO consists of the many local unions affiliated with it and the members of those local unions. In Jefferson County alone, the Alabama AFL-CIO has approximately thirty thousand members almost all of which will have to pay the Jefferson County occupational tax. The members are working people, ranging from laborers and janitors to skilled trades persons. Very few of its members fall within the exceptions to the tax, which allow persons such as highly paid professionals to avoid the tax.

The Public Employees Local Union No. 1317, Laborers International Union of North America, consists of approximately seven hundreds persons working in Jefferson County. Its members include the nonsupervisory employees of the Street and Sanitation Department and the Park and Recreation Board of the City of Birmingham and the custodial employees of the Birmingham Board of Education. To the best of the knowledge of Local No. 1317, none of its members will qualify for the exceptions to the Jefferson County occupational tax. By and large, the members of Local No. 1317 are paid far less in wages than are the highly paid professionals who are exempted from the tax.

The amici should note that they are not arguing that their members should be exempted from paying a fair and equitable share of taxes. Obviously, taxes are a price we pay for living in a civilized society. However, the amici object strongly to their members being forced to pay a tax which exempts many of the most highly paid citizens of Jefferson County, whose license taxes are even proportionately less than the tax being challenged in this action.

ARGUMENT

I. THE EXEMPTIONS TO THE TAX MAKE IT INEQUITABLE, SHOWING THAT IT WAS NOT INTENDED BY THE LEGISLATURE AND THAT IT VIOLATES PRINCIPLES OF EQUAL PROTECTION.

The exemptions to the tax make it a highly inequitable tax. The effects of those exemptions were described briefly in the testimony of Hoyt Bedingfield, Jr. (Tr. 23 *et*

seq.). The highest paid employee of the City of Birmingham, the City Attorney, is exempted from paying the Jefferson County occupational tax, while the much lower paid members of the amici, who are collecting garbage and repairing streets, must pay the tax. The unfairness is not limited to employees of the City of Birmingham. As was pointed out by the Jefferson County Revenue Director and by the two dissenting members of the Jefferson County Commission, a highly paid private professional such as a doctor, dentist or attorney is exempted from the tax, while his or her secretary must pay it.

The equitability of the tax has special significance in this case. The evidence includes a memo from the person who was Acting Finance Director at the time that Act No. 406 was passed and, in the terms of the current Revenue Director, was being "implemented". The Revenue Director at the time pointed out that Act No. 406 was passed to make County taxation more "equitable". (Court Ex. 1, App. "D"). Twenty years later, the Jefferson County Commission has attempted to use that Act to establish what everyone agrees is a very inequitable tax because of the exemptions.

Under well established principles of statutory construction, the opinion of the Revenue Director at the time of the passage of Act No. 406 is especially important in determining what was intended by the Act. *E.g., Eagerton v. Terra Resources, Inc.*, 426 So.2d 807, 809 (Ala. 1982). As unions know too well, long standing administrative construction is frequently followed by this Court. *International Union of Operating Engineers Local Union No. 321 v. Water Works Board of the City of Birmingham*, 276 Ala. 462,

465, 163 So.2d 619 (1964). The Court should make no exception for Jefferson County.

In addition, the exemptions in the County occupational tax are crucial to the claim of equal protection which is made in this case but which the Circuit Court did not address. The amici cannot conceive of any basis for saying that a tax should fall most heavily on those least able to pay it. By exempting highly paid professionals when those persons pay proportionately less in license taxes, the County has made distinctions that have no rational basis. Those distinctions cannot withstand scrutiny under equal protection principles mandated by the State and Federal Constitutions. *E.g., City of Hueytown v. Jiffy Chek Company of Alabama*, 342 So.2d 761 (Ala. 1977).

CONCLUSION

For the reasons stated herein and in the brief of the appellants, this Court should reverse the Circuit Court and require that the Jefferson County occupational tax be declared invalid.

Respectfully submitted,

/s/ Guy Larry Tipton
Guy Larry Tipton
2501-C 30th Avenue North
Birmingham, Alabama 35207
205/252-8005

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing and has been served upon the following counsel of record by depositing same in the U. S. Mail, postage prepaid, on this the 17th day of December, 1987:

Edwin A. Strickland, Esquire
213 Jefferson County Courthouse
Birmingham, Alabama 35263

Ronald L. Spratt, Esquire
1400 Bank for Savings Building
Birmingham, Alabama 35203-4007

Donald V. Watkins, Esquire
Watkins, Carter & Knight
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233

Joe R. Whatley, Jr., Esquire
Falkenberry & Whatley
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203

David A. Sullivan, Esquire
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233

Samuel Fisher, Esquire
City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203

/s/ Guy Larry Tipton
Guy Larry Tipton

IN THE SUPREME COURT OF ALABAMA

No.

HOYT BEDINGFIELD, JR., et al.,
Plaintiffs-Appellants
v.
JEFFERSON COUNTY, ALABAMA, et al.,
Defendants-Appellees.

CAROLYN PHILLIPS, et al.,
Plaintiffs-Appellants,
v.
THE JEFFERSON COUNTY COMMISSION,
Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Birmingham Area Chamber of Commerce hereby moves for leave to file the attached amicus brief. This motion is based on the following:

1. The Birmingham Area Chamber of Commerce has more than 4000 members, over 3000 of which are businesses located in Jefferson County. Those businesses will

be directly and dramatically affected by the Jefferson County occupational tax which is being challenged in this action. All such businesses will incur the costs of implementing, collecting, and paying over the tax. One member alone, Sonat, is spending approximately $20,000.00 to make changes to its payroll system in order to comply with the tax. In addition, businesses located in Jefferson County are competing with businesses in nearby states and other areas of Alabama and they have now been placed at a competitive disadvantage. Examples of such competitive disadvantages have been seen most clearly in the instances of office buildings which were already being developed. Potential tenants of those buildings are now locating in other areas in order to avoid the payment of the Jefferson County occupational tax.

2. Moreover, as described in the amicus curiae brief, the Birmingham Area Chamber of Commerce was involved in making a study and then reviewing it with the County at the times preceding the adoption of the occupational tax. The Chamber and others had advised the County Commission that for many important reasons the occupational tax was one of the least desirable of the possible alternatives to dealing with the financial problems of Jefferson County.

3. The Birmingham Area Chamber of Commerce is charged with the responsibility of promoting economic growth throughout the Birmingham metropolitan area and employs business development specialists to carry out this function. It is The Chamber's belief that the proposed occupational tax will be considered as an income tax and that since no similar tax would be collected in other Alabama counties or in neighboring states,

Jefferson County will no longer be able to compete as effectively and that this lack of competitiveness will cost the County hundreds of future jobs and thousands of dollars in lost tax revenues.

Respectfully submitted,

/s/ William R. Tillery
William R. Tillery
Corporate Secretary
Birmingham Area Chamber
of Commerce
Commerce Center, 7th Floor
2027 1st Avenue North
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing and has been served upon the following counsel of record by depositing same in the U. S. Mail, postage prepaid, on this the 18 day of December, 1987:

Edwin A. Strickland, Esquire
213 Jefferson County Courthouse
Birmingham, Alabama 35263

Ronald L. Spratt, Esquire
1400 Bank for Savings Building
Birmingham, Alabama 35203-4007

Donald V. Watkins, Esquire
Watkins, Carter & Knight
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233

Joe R. Whatley, Jr., Esquire
Falkenberry & Whatley
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203

David A. Sullivan, Esquire
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233

Samuel Fisher, Esquire
City of Birmingham
Law Department
600 City Hall
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/s/ William R. Tillery
William R. Tillery

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OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

AMICUS BRIEF ON BEHALF OF THE BIRMINGHAM AREA CHAMBER OF COMMERCE

William R. Tillery
Corporate Secretary
Birmingham Area Chamber of Commerce
Commerce Center, 7th Floor
2027 1st Avenue North
Birmingham, Alabama 35203

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STATEMENT OF THE CASE

The Birmingham Area Chamber of Commerce adopts the appellants' statement of the case.

INTEREST OF THE AMICUS CURIAE

The Birmingham Area Chamber of Commerce has more than 4000 members, over 3000 of which are businesses located in Jefferson County. Those businesses will be directly and dramatically affected by the Jefferson County occupational tax which is being challenged in this

action. All such businesses will incur the costs of implementing, collecting, and paying over the tax. One member alone, Sonat, is spending approximately $20,000.00 to make changes to its payroll system in order to comply with the tax. In addition, businesses located in Jefferson County are competing with businesses in nearby states and other areas of Alabama, and they have now been placed at a competitive disadvantage. Examples of such competitive disadvantages have been seen most clearly in the instances of office buildings which were already being developed. Potential tenants of those buildings are now locating in other areas in order to avoid the payment of the Jefferson County occupational tax.

Moreover, as more fully described in the Statement of Facts, the Birmingham Area Chamber of Commerce was involved in performing studies on county financing and then discussing these with the County at the times preceding the adoption of the occupational tax. The Chamber and others had advised the County Commission that for many important reasons the occupational tax was one of the least desirable of the possible alternatives to dealing with the financial problems of Jefferson County.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. When the Legislature Enacted Act No. 406 in 1967, Did it Intend to Authorize Jefferson County to Levy, Assess and Collect an Occupational Tax?

II. Even Assuming for Purposes of Argument that Jefferson County May Levy an Occupational Tax, Does the County Have the Authority to Assess and Collect an Occupational Tax?

STATEMENT OF THE FACTS

In 1986, the Birmingham Area Chamber of Commerce assisted the Jefferson County Commission in conducting a study about the various ways to address financial problems being experienced by and projected for the County. The Chamber arranged for and assisted the County Commission by obtaining volunteers to conduct the study. The study made certain recommendations and concluded that an occupational tax was one of the most undesirable means to address the problem.

In 1987, a new County Commission came into office, and it then spent $250,000 on a similar study conducted jointly by the accounting firms of Coopers & Lybrand and Banks, Finley White & Company. That study made a number of recommendations for cost savings and for revenue increases by the County.

It is out of this study by Coopers & Lybrand and Banks, Finley White & Company that the idea that Act No. 406 might authorize an occupational tax first developed. The Chamber understands that there is some discussion of this in the deposition of the County Revenue Director, Clint Ritchie, which has been filed with the Court.

It is most significant to note that the Jefferson County Commission has not adopted any of the measures for cost savings proposed by the study.

It is also important to note that the Chamber projects that the occupational tax will bring in as much as twenty-

five million dollars to the County, when in fact the funding gap projected to the County is much closer to approximately three million dollars even without considering other increases in taxes which the Jefferson County Commission is implementing. Those other increases in taxes, according to the Chamber's projection, will more than make up for the funding gap being experienced by the County.

From the standpoint of the numerous businesses in Jefferson County who are now having to undergo the expense of implementing the occupational tax, it is important for the Court to recognize that numerous legislators in Jefferson County have publicly stated that they will repeal the County occupational tax through legislation as soon as the next session of the Legislature begins, and, as of the present time no legislator has publicly supported the occupational tax. This means that businesses within the County will have spent large sums of money to implement a tax which will be in effect for a very few months, and then must spend more to change back to the original system. One example of the cost of implementation is with Sonat, which is spending approximately $20,000.00 for payroll system changes necessary to put the tax into effect.

The economic effects of the tax on Jefferson County are already being felt. Businesses within the County are now put at a competitive disadvantage with businesses outside of the County. The effect of this competitive disadvantage is seen most clearly in the instances of office buildings which were already being developed. Potential tenants of theses [sic] Jefferson County office buildings are now known to be locating in other areas to avoid

payment of the Jefferson County occupational tax The effects are seen most dramatically in office building developments located only a short distance apart. If such a development is located within the boundaries of Jefferson County, then any business leasing in such a building will have to deduct occupational taxes from its employees, and any employees whom it locates there, including decision making employees, will have to pay the occupational tax.

On the other hand, if the building were located only a short distance away, but in another County, then there would be no such tax. Especially when a decision making employee will have the tax deducted from his or her salary, the location decision will obviously be against locating in Jefferson County.

ARGUMENT

I. THE OCCUPATIONAL TAX WAS NEVER INTENDED BY ACT NO. 406.

The Chamber adopts the arguments of the appellant regarding the intent of Act No. 406. As the County Revenue Director has testified, and as an earlier Revenue Director has indicated in writing, Act No. 406 never was intended to authorize an occupational tax.

II. EVEN ASSUMING FOR PURPOSES OF ARGUMENT THAT JEFFERSON COUNTY MAY LEVY AN OCCUPATIONAL TAX, THERE IS NO AUTHORITY FOR THE COUNTY TO ASSESS OR COLLECT THE TAX.

From the standpoint of the many businesses who are members of the Birmingham Area Chamber of Commerce

and who are being required to implement the occupational tax, apparently under the threat of possible criminal penalties, an important issue is whether there is any authority for the County to assess, implement or require the collection of the occupational tax. On that issue the Circuit Court seemed to indicate that it was initially inclined to rule for the plaintiffs. However, the Circuit Court incorrectly determined that the County had the implied authority for the collection and criminal measures to be imposed into the terms of the tax. There is plainly no such authority for the implementation and collection procedures of the tax. As the defendants have recognized in the Circuit Court, there is a distinction between the authority to levy a tax and the authority to assess or collect a tax. The Constitution of the State of Alabama recognizes that distinction, and prohibits local laws for assessment or collection of taxes. E.g., Constitution of Alabama of 1901, Article IV § 104. Since the County has cited only a local law, Act No. 406, as its authority for the occupational tax, it has no authority to assess, implement or collect the tax.

By contrast, where the Legislature has truly intended for a tax to be collected, it has provided for it in the Alabama Code. The means for collecting the license taxes, which were authorized by Act No. 406, are provided for in *Ala. Code* § 40-12-2 (1975). The Legislature has provided specific authority for the implementation of and collection of a municipal occupational tax. See *Ala. Code* § 11-51-90 *et seq.* (1975). However, there is no comparable authority for a county, even for Jefferson County.

Thus, the assessment and collection provisions of the County occupational tax should be declared invalid.

CONCLUSION

For the reasons stated in the brief of the appellants, and for the reasons stated herein, this Court should reverse the Circuit Court and require that the County occupational tax be declared invalid.

Respectfully submitted,

/s/ William R. Tillery
William R. Tillery
Corporate Secretary
Birmingham Area Chamber
of Commerce
Commerce Center, 7th Floor
2027 1st Avenue North
Birmingham, Alabama 35203

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Edwin A. Strickland, Esquire
213 Jefferson County Courthouse
Birmingham, Alabama 35263

Ronald L. Spratt, Esquire
1400 Bank for Savings Building
Birmingham, Alabama 35203-4007

Donald V. Watkins, Esquire
Watkins, Carter & Knight
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233

Joe R. Whatley, Jr., Esquire
Falkenberry & Whatley
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203

David A. Sullivan, Esquire
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233

Samuel Fisher, Esquire
City of Birmingham
Law Department
600 City Hall
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/s/ William R. Tillery
William R. Tillery

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ON APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
IN EQUITY

AMICUS CURIAE BRIEF ON BEHALF OF SHELBY COUNTY, ALABAMA

Frank C. Ellis, Jr., Esquire
WALLACE, ELLIS, HEAD & FOWLER
P. O. Box 587
Columbiana, Alabama 35051
205/669-6783

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STATEMENT OF THE CASE

Amicus curiae Shelby County adopts the Statement of the Case contained in the Appellants' primary brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Shelby County adopts the Statement of the Issues contained in the appellants' primary brief, alleges the general invalidity of Ordinance No. 1120 and in addition thereto states the following additional issues presented for review:

1. Does Ordinance No. 1120 adopted by the Jefferson County Commission Place an Undue Burden on Shelby County Employers and Workers by Virtue of the Reporting Requirements Associated with the Tax?

2. Does the Jefferson County Commission have Jurisdiction to Enact an Ordinance Which Requires Record Keeping, Collections, and Payments by Shelby County Employers and Employees?

3. Even Assuming for Purposes of Argument that Jefferson County May Levy an Occupational Tax on Businesses in Shelby County, is there any Authority for Jefferson County to Assess or Collect such a Tax from Employers in Shelby County?

4. Are the Needs of Jefferson County Substantially Greater than those of Shelby County, which Includes the Most Rapidly Growing Unincorporated Area of the State?

5. Will Enforcement of Ordinance 1120 Against Citizens of Shelby County Constitute Taxation without Representation?

STATEMENT OF THE FACTS

Amicus curiae Shelby County adopts the Statement of the Facts contained in the Appellants' primary brief in this appeal.

STATEMENT OF INTEREST

Shelby County, Alabama is located south of Jefferson County, Alabama. Due to its geographical proximity to Jefferson County as well as the direction of growth in the Birmingham metropolitan area, a great number of people live in Shelby County and work in Jefferson County. This group of people may be divided into two categories: 1) those who reside in Shelby County but commute each day to offices or jobs in Jefferson County; and 2) those who reside in Shelby County, are employed by employers in Shelby County or have offices in Shelby County, but who actually perform all or part of their work in Jefferson County.

The first category of Shelby County is a large one. The last available statistics from the United States Census Bureau show that, as of 1980, more than 12,000 people lived in Shelby County but work in Birmingham, Bessemer, Fairfield, Mountain Brook, Homewood, or elsewhere in Jefferson County. This number constituted approximately 44% of the work force in Shelby County.[1] The numbers are sure to have increased significantly since 1980. These citizens would feel the impact of the occupational tax ordinance at issue in this case, Jefferson County Ordinance No. 1120 (hereinafter, "Ordinance"), in the same way as a Birmingham resident who is employed in Jefferson County.

The second category of Shelby County is affected, not only by the payment of the tax itself, but by the record keeping and collection provisions of the ordinance. In light of the recent growth in the area of the Riverchase Galleria, both residential and commercial, it is likely that the number of affected citizens is comparable to that of the first category.

According to the terms of the Ordinance, Shelby County businesses which employ persons to perform all or part of their work in Jefferson County are charged with the responsibility of figuring the proportion of the employee's income derived by working in Jefferson County; deducting the occupational tax from that subject income; and filing occupational tax returns for all such

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[1] These statistics were provided by the Alabama Department of Economic and Community Affairs.

employees with the Director of Revenue for Jefferson County.

This burden will fall most heavily on businesses who employ non-professionals in the middle-to lower income ranges, because the ordinance exempts persons who pay a license tax to the State of Alabama from the occupational tax. For example, a television repair business which employs persons to perform television repairs at homes in the north Shelby County south Jefferson County area would be required to figure what proportion of each employee's work is done in Jefferson County, deduct the proportionate tax from its employees' paychecks, pay the tax to the Jefferson County Director of Revenue, file regular returns with the Director, and keep records relating to these transactions for at least five years. Obviously, this will create a bookkeeping nightmare for the many small-to medium sized businesses in Shelby County.

ARGUMENT

I. ORDINANCE NO. 1120 PLACES AN UNDUE BURDEN ON SHELBY COUNTY EMPLOYERS AND WORKERS BY VIRTUE OF THE REPORTING REQUIREMENTS CONTAINED IN SECTIONS FOUR AND FIVE

Section Four of Jefferson County Ordinance No. 1120 (hereinafter, "Ordinance") requires any employer who "employs any person in any vocation, occupation, calling or profession in Jefferson County" [Section 1(E)] to deduct license fees required by the occupational tax ordinance from the employer's payments to the employee. After those deductions are made, the employer is further

required to submit monthly or quarterly returns to the Jefferson County Director of Revenue. Ordinance, § 4. In the event that the employer does not file the required returns, the employee must file a return. Ordinance, § 5.

The ordinance makes no exception for employers or employees whose place of business or main office is located in another county. Therefore, the filing and withholding requirements would place a heavy burden on Shelby County businesses that employ persons to actually perform work in Jefferson County. The Shelby County employer is faced with a mound of additional paperwork necessitated by the payroll deduction, the filing of returns to yet another governmental agency, and incidental bookkeeping relating to the occupational tax. None of this paperwork, which in itself constitutes a significant expense to the employer, benefits Shelby County.

By the terms of the Ordinance, Shelby County employers would be faced with the compilation of the following information which is required to be given to the Jefferson County Director of Revenue:

1. The gross amount of each employee's compensation;

2. The amount of license fees deducted and paid during the last calendar year by the employer from the employee's compensation;

3. The last known address of each such employee.

In addition, the employer is required to keep accurate records of the deductions, returns, etc., for five years

after the taxed wages or payments were earned. Ordinance, Section 4.

Those requirements create an entirely new set of records and calculations which must be established and maintained by Shelby County employers, with no accompanying benefit to that employer.

II. THE JEFFERSON COUNTY COMMISSION IS WITHOUT JURISDICTION TO ENACT AN ORDINANCE WHICH REQUIRES SUCH RECORD KEEPING AND PAYMENTS BY SHELBY COUNTY EMPLOYERS AND EMPLOYEES.

It is self-evident that a county commission has no power to enact or enforce ordinances to apply to persons or property outside the geographical boundaries of its own county. The commission's powers extend only as for [sic] as the county line.

Furthermore, the Jefferson County Commission, as a governmental agency, has "no power and is subject to no duty not originating from the law creating it or in the statutes declaring such power and duty." *State ex rel. Tallapoosa County v. Butler*, 227 Ala. 212, 214, 149 So. 101 (Ala. 1933), *citing State ex rel. Chilton County v. Butler*, 225 Ala. 191, 142 So. 531. The Jefferson County Commission has no inherent jurisdiction to make *any* laws, much less laws which apply to or burden other counties. *See Tuscaloosa County v. Great So. R. Co.*, 150 So. 328, 227 Ala. 428, 432 (Ala. 1933); *see also Jefferson County v. City of Birmingham*, 248 Ala. 319, 325, 27 So.2d 584 (Ala. 1946) (county has no inherent power of taxation.) The enumeration of powers granted to county commissions found in

Ala. Code § 11-3-11 (1975) contains no provision for the passage of an ordinance affecting other counties; neither is there any such provision elsewhere in the Code or the 1901 Constitution.

Nevertheless, the Jefferson County Commission here attempts to implement a tax scheme which will force individual citizens and businesses in Shelby County to, in effect, help Jefferson County collect and keep track of its tax revenues. To make matters worse, those revenues collected will have been generated by Shelby County labor. The administration of the tax filing system is financed by investments made and property owned in Shelby County. Despite this investment into the maintenance of records for the benefit of Jefferson County, neither Shelby County nor the burdened businessman will receive a penny of the tax revenues generated by the law. Aside from the obvious unfairness in this system, the enacting Commission simply has no authority to pass such a tax ordinance and apply it outside its own boundaries.

III. EVEN ASSUMING FOR PURPOSES OF ARGUMENT THAT JEFFERSON COUNTY MAY LEVY AN OCCUPATIONAL TAX ON BUSINESSES IN SHELBY COUNTY, THERE IS NO AUTHORITY FOR JEFFERSON COUNTY TO ASSESS OR COLLECT THE TAX.

Even if Jefferson could somehow impose the requirements of the occupational tax on businesses in Shelby County, there is no authority for the County to assess, implement or require the collection of the occupational tax. On that issue the Circuit Court seemed to indicate

that it was initially inclined to rule for the plaintiffs. However, the Circuit Court incorrectly determined that the County had the implied authority for the collection and criminal measures to be imposed into the terms of the tax. There is plainly no such authority for the implementation and collection procedures of the tax. As the defendants have recognized in the Circuit Court, there is a distinction between the authority to levy a tax and the authority to assess or collect a tax. The Constitution of the State of Alabama recognizes that distinction, and prohibits local laws for assessment or collection of taxes. E.g., Ala. Const. of 1901, Art. IV § 104. Since the County has cited only a local law, Act No. 406, as its authority for the occupational tax, it has no authority to assess, implement or collect the tax.

By contrast, where the Legislature has truly intended for a tax to be collected, it has provided for it in the Alabama Code. The means for collecting the license taxes, which were authorized by Act No. 406, are provided for in *Ala. Code* § 40-12-2 (1975). The Legislature has provided specific authority for the implementation of and collection of a municipal occupational tax. See *Ala. Code* § 11-51-90 *et seq.* (1975). However, there is no comparable authority for a county, even for Jefferson County.

Thus, the assessment and collection provisions of the County occupational tax should be declared invalid.

IV. THE NEEDS OF JEFFERSON COUNTY ARE NO GREATER THAN THOSE OF SHELBY COUNTY.

The only evidence which Jefferson County offered at trial was apparently an attempt to show the needs of an

urban county. However, it should be recognized that the fastest growing area in the State is in North Shelby County, much of which is outside the corporate boundaries of any municipality. While Jefferson County enjoys the shopping centers such as the Galleria which bring in enormous amounts of tax revenue, Shelby County has the financial burden of providing many services such as education which the shoppers return to their homes.

It is inconceivable that Jefferson County, and only Jefferson County, can justify a special tax, which the Legislature could not have been thinking about when it enacted Act No. 406 in 1967, and then impose on businesses in Shelby County the implementation, collection, and record-keeping requirements associated with the tax. The special treatment which Jefferson County asserts here is even less tenable than that asserted and rejected in *Crandall v. City of Birmingham*, 442 So.2d 77, 79 (Ala. 1983).

If the Legislature had intended to authorize counties in Alabama to levy, implement and collect an occupational tax, then it would have done so in the same manner as it did for municipalities in *Ala. Code* § 11-51-90 *et seq.* (1975). Especially since "it is established that taxing statutes should be strictly construed against the taxing power" *Alabama Farm Bureau Mutual Casualty Insurance Co. v. City of Hartselle*, 460 So.2d 1219, 1223 (Ala. 1984), this Court should hold that the Jefferson County occupational tax is invalid.

V. ENFORCEMENT OF ORDINANCE 1120 AGAINST THE CITIZENS OF SHELBY COUNTY WOULD CONSTITUTE TAXATION WITHOUT REPRESENTATION

The idea that citizens of a civilized nation should not be taxed unless they are represented in the legislative body that enacted the tax is one that lies at the very core of our concept of American democracy. In late 1773 and the spring of 1774, colonial Americans protested British imposition of duties and other taxes upon Americans who had no representation in Parliament and virtually no communication with either the Crown or the colonial government. *See The Almanac of American History* 112-114 (A. M. Schlesinger, Jr., gen. ed. 1983). This was one of the primary problems caused by British governance which led to the American Revolution. Present day courts and governmental bodies must not be allowed to forget this concept, so basic to our system of government and our notion of "liberty."

The power to levy taxes is a purely legislative power. *Champion v. McLean*, 266 Ala. 103, 117, 95 So.2d 82 (1957). It is an incident of sovereignty, *id.*, and, as such, it cannot be delegated. In fact, the Alabama Constitution specifically forbids delegation of the power to levy taxes. Ala. Const. of 1901, Art. XI, § 212. While the legislature has amended the state constitution in such a way as to enable counties and municipalities to levy and collect taxes in certain situations, this is not the case here, for two reasons.

First, there has been no valid action by the legislature giving Jefferson County the authority to enact and

enforce Ordinance 1120. The Act upon which the appellee relies was never intended to allow Jefferson County to pass an occupational tax. Furthermore, the County's later attempts to have the Legislature pass such an act failed, resulting in this thinly-veiled resort to reliance on a twenty-year-old statute. These points are addressed in detail in the appellants' brief; Shelby County adopts and recommends those arguments to the Court.

Also, Section 212 of Constitution is premised upon the idea that no body, other than a legislative body elected by those subject to a tax, has the authority, under our system of government, to levy a tax. Because the source of power for our state government is the citizenry itself, see Ala. Const. of 1901, Art. I, § 2, the citizenry must elect the taxing power.

As the Justices of the Supreme Court noted to the Legislature, the delegation of tax assessment duties to one not elected by the taxpayers is violative of § 212. *Opinion of the Justices*, 379 So.2d 939 (1980). Again, this opinion is premised on the notion that the grant of assessment authority to one over whom the subject electorate has no political control contravenes our system of representative government.

The power to tax is a broad power indeed. Outside of the limitations created by the constitutional guarantees of equal protection and due process, the only real check on that power is that of the vote. If that means of control is lost by virtue of one county's exercise of taxing, and the concomitant regulatory, power over the citizens of another county, then there is no check whatsoever.

VI. AMICUS CURIAE SHELBY COUNTY ADOPTS ALL OF THE ARGUMENTS MADE BY APPELLANTS BEDINGFIELD AND THE CITY OF BIRMINGHAM IN THEIR BRIEF.

The appellants' brief submitted in this case thoroughly examines the legislative history of Act No. 406, the legislation upon which the appellee relies for the authority to enact and enforce Ordinance 1120, as well as the other Alabama law in this area. As the appellants have shown, there is clearly no authority for Jefferson County to force this occupational tax upon the amici in this case or anyone else. Furthermore, even if this Court were to find that Act No. 406 was intended to provide this authority, the Act is unconstitutional as applied in this case.

Shelby County joins in and adopts all of the arguments advanced by the appellants. The damage which the appellants and citizens of Jefferson County will suffer if this tax is allowed to stand will enure doubly to the citizens of Shelby County who will be affected by the Ordinance, as the latter will see no benefit or gain whatsoever from their payment of this inequitable tax.

CONCLUSION

For the reasons stated in the brief of the appellants, and for the reasons stated herein, this Court should

reverse the Circuit Court and require that the County occupational tax be declared invalid.

Respectfully submitted,

/s/ Frank C. Ellis, Jr.
Frank C. Ellis, Jr., Esquire
WALLACE, ELLIS, HEAD & FOWLER
P. O. Box 587
Columbiana, Alabama 35051
205/669-6783

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing and has been served upon the following counsel of record by depositing same in the U. S. Mail, postage prepaid, on this the 6 day of January, 1988:

Edwin A. Strickland, Esquire
213 Jefferson County Courthouse
Birmingham, Alabama 35263

Ronald L. Spratt, Esquire
1400 Bank for Savings Building
Birmingham, Alabama 35203-4007

Donald V. Watkins, Esquire
Watkins, Carter & Knight
Suite 214
500 So. 22nd St.
Birmingham, Alabama 35233

Joe R. Whatley, Jr., Esquire
Falkenberry & Whatley
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203

David A. Sullivan, Esquire
Suite 214
500 So. 22nd Street
Birmingham, Alabama 35233

Samuel Fisher, Esquire
City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203

/s/ Frank Ellis, Jr.
Frank C. Ellis, Jr.

Hoyt BEDINGFIELD, Jr., in his capacity as the acting director of finance of the city of Birmingham, et al.

v.

JEFFERSON COUNTY, et al.

87-316.

Supreme Court of Alabama.

May 20, 1988.

City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax.

Affirmed.

Donald V. Watkins of Watkins, Carter & Knight and Joe R. Whatley, Jr., of Falkenberry & Whatley and David A. Sullivan and Samuel Fisher, Birmingham, for appellants.

Edwin A. Strickland, Birmingham, for appellees.

Guy Larry Tipton, Birmingham, for amicus curiae Alabama AFL-CIO and the public employees local union No. 1317, Laborers Intern. Union of North America.

William R. Tillery, Birmingham, for amicus curiae Birmingham Area Chamber of Commerce.

Frank C. Ellis, Jr., of Wallace, Ellis, Head & Fowler, Columbiana, for amicus curiae Shelby County.

BEATTY, Justice.

This is an appeal by Hoyt Bedingfield, Jr., as acting director of finance of the City of Birmingham, and the City of Birmingham from a judgment upholding a Jefferson County ordinance, specifically Ordinance No. 1120, establishing an occupational tax. We affirm.

The action was filed on October 19, 1987, and was consolidated for trial with the case of *Carolyn Phillips, et al. v. Jefferson County Commission.*

Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county. This tax was promulgated by Jefferson County under the authority of Act No. 406, approved September 7, 1967, *Acts of Alabama 1967,* at 21-23. Pertinent sections thereof are quoted below:

"AN ACT

"To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

"Be It Enacted by the Legislature of Alabama:

"Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

". . . .

"Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

"Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

"Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

"Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity."

Allegations of unconstitutionality made below were denied by the defendants. Following discovery, testimony taken in open court, and stipulation, the Jefferson Circuit Court upheld the ordinance, and this appeal followed. Because a number of issues are presented here, we shall treat them *seriatim*.

I.

Did Act No. 406 manifest a legislative intent to authorize Jefferson County to levy an occupational tax?

Plaintiffs' argument here is multifaceted. First, they contend that the stated purpose of the Act is to authorize a tax only upon "certain businesses," and not "occupations." Further, plaintiffs argue that § 6 of Act No. 406 does not permit a privilege tax "which is in excess of the rate of license or privilege tax levied by the largest municipality of the County on the same or similar type of business activity," meaning that Jefferson County could not implement the Act by levying a tax in excess of that which had been levied by Birmingham. Because Birmingham had no such privilege tax in 1967, plaintiffs

argue, any county tax under Act No. 406 would offend the Act. Finally, according to plaintiffs, the county's own implementation of the Act when it was enacted in 1967, as only a licensing code authorizing licensing of certain businesses, gives weight to the limiting nature of Act No. 406.

We must respectfully reject these arguments. While we are mindful that taxing statutes are to be strictly construed, *State v. Seals Piano Co.*, 209 Ala. 93, 95 So. 451 (1923), it does not offend that principle to uphold this statute. Indeed, the express language of the Act authorizes the county "to levy a business or privilege tax upon any business, vocation, occupation, calling or profession." When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction. *American Institute of Psychotherapy v. Alabama Board of Examiners in Psychology*, 410 So.2d 54 (Ala.1982). Thus, § 4 is to be read as authorizing a privilege tax "upon any person for engaging in any business [or occupation]."

Municipal licensing authority has existed at least since the Code of 1907, see Code of 1975, § 11-51-90. Birmingham originally adopted its licensing code as early as 1916, and in 1967 it had an extensive catalog of business categories subject thereto. However, it was not until 1970 that Birmingham itself adopted Ordinance No. 70-76, providing for a license fee for occupations and professions. Given the fact that Birmingham had possessed the authority under state law to impose an occupational privilege tax since 1907, it is clear that by § 6 of Act No. 406 the legislature, cognizant of that power, decided

to restrict the county's authority to a maximum as established by Birmingham's occupational privilege tax. It is a fundamental principle that the legislature in enacting a statute, is presumed to have full knowledge and information on prior and existing law on the subject of the statute. *Ex parte Love*, 513 So.2d 24 (Ala.1987). Thus, we cannot agree with plaintiffs that Act No. 406 required Jefferson County to implement its authority contemporaneously thereunder, or lose it altogether. The Act itself contains no such limiting language. True, Jefferson County did not implement the "occupational" aspect of the statute until 1987. Nevertheless, the authority to do so continued.[1]

Finally, we are not persuaded by plaintiffs' argument that, in construing Act No. 406, this Court should defer to the county's alleged contemporaneous interpretation of the Act. Because we do not find the Act doubtful in its meaning, we need not resort to an alleged contemporaneous interpretation by the county.

II.

Is Act No. 406 unconstitutional as violating limitations on local legislation as explained in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978)?

According to plaintiffs, Act No. 406 violates the mandate of *Peddycoart* in two respects: (1) the general laws of

---

[1] By stipulation, it was established that, while Birmingham itself adopted its license code as early as 1916, and possessed an extensive license code in 1967, it did not establish its occupational tax until 1970.

Alabama have preempted the field of license and privilege taxation to prevent reliance upon local legislation, and thus Act No. 406 violates Section 105 of the Constitution; and (2) the population classification of Act No. 406 (500,000 or more), which makes it a "bracket bill," lacks a reasonable relationship with the statute's purpose.

Commenting upon *Peddycoart* in *Freeman v. Purvis*, 400 So.2d 389 (Ala.1981), this Court stated:

> "We must point out, however, that following the *Peddycoart* decision which was released on January 13, 1978, two amendments to the Alabama Constitution of 1901 were ratified by the people: Amendment No. 375, ratified on November 20, 1978, and Amendment No. 389, ratified on November 4, 1980. Because the latter Amendment is pertinent, we quote it here:
>
> " 'Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.
>
> " 'All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on January 13, 1978, and no other, despite changes in population.'
>
> ". . . .

> "The effect of this Amendment was to validate all 'bracket bills' enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional. . . . "

Act No. 406 was approved in 1967, well before the date of the *Peddycoart* decision of January 13, 1978, and, as a general law of local application, was validated by Amendment 389 even though it was not advertised under Section 106 of the Constitution of 1901.

Even under pre-*Peddycoart* standards, Act No. 406 must survive a constitutional attack based on a supposed lack of relationship between its purpose and the expressed population classification. As observed in *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937), on that subject, much is left to legislative discretion in fixing that classification and in recognizing that purpose. In *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950), this Court reviewed a number of its decisions that had upheld "bracket bills" of substantial minimum, but no maximum, population classifications:

> "We have numerous decisions which give illustration to the principle. We will not undertake to analyze them all, but only such as seem to shed light upon the instant suit. In the case of *"Wages v. State*, 225 Ala. 2, 141 So. 707, 708 [1932], this Court was dealing with an act similar to the one here involved. By its terms it had application to counties having a population of three hundred thousand or more according to the last or any subsequent federal census. The Court there undertook to apply the principle which we have stated above. The act was held to be general, although it then applied only to

> Jefferson County. We quote from that opinion as follows: 'The wisdom of the law and the necessity for its enactment and the classification adopted were addressed to the lawmaking body. It may be well said, this body understood and appreciated the necessity of furnishing protection to the people in the matter legislated upon in the act, in the larger and more populous counties of the state, which was not necessary or practicable in the smaller counties.'
>
> "We have numerous cases which bring out that application of the principle wherein it was observed that counties of large population may reasonably be supposed to be differently served in many respects than counties of smaller population and there is sometimes drawn a distinction between a classification based upon a minimum population and a classification based upon a population with both a minimum and maximum limit. The case of *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 [1933], brings out that distinction. That case was dealing with an act regulating the business of plumbing in counties having a population of 100,000 or more according to the last or any subsequent federal census. The Court emphasized the different principles applicable when there is only a minimum but not a maximum number. When there is only a minimum, the Court thought a more liberal application of the principle should be made.
>
> ". . . .
>
> "*In the Opinion of the Justices*, 249 Ala. 511, 31 So.2d 721, we were responding to a legislative inquiry as to a proposed act applicable to counties of 400,000 population or more according to the last or any subsequent federal census,

> which would require the payment to such counties of a license tax of one cent on each gallon of gasoline. We thought there was a reasonable relation of the subject matter of the Act to counties of such population because we thought that in large counties the load of traffic on the highways by reason of such population justified the legislature in providing additional income in order to take care of its effect."

It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county governments keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*

Is Act No. 406 unconstitutional under § 105, Constitution of 1901?

Plaintiffs maintain that Act No. 406 is unconstitutional under Section 105, Constitution of 1901. The pertinent part of that section states that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Plaintiffs reason that Act No. 406 is infirm under that provision because of the prior enactment of Article I, Chapter 20, Title 51, Code of 1940, now Article II, Chapter 12, Title 40, Code of 1975, which provides:

> "Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title."

Section 40-12-40, Code of 1975.

Act No. 406, as we have stated, is a general law, not a local law; thus Section 105 is inapplicable.

III.

Finally, plaintiffs contend that Act No. 406 fails for want of an express provision therein for the collection of an occupational tax. Plaintiffs argue further that a reading of Act No. 406 to so provide would violate Section 104(15) of the Constitution of 1901, which prohibits the enactment of a local law "[r]egulating either the assessment or collection of taxes."

For the reasons previously discussed, Act No. 406 is a general, not a local law; hence, this provision, Section 104(15), is inapplicable. And, as the trial court found:

> "The Courts have long held that there is a distinction between the terms 'assessment' and 'levy' and held that 'assessment,' as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices,* 266

Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. v. Limestone County*, 220 Ala. 231, 234-235, 124 So. 523 (1929)."

Moreover, the grant of authority to "levy a license or privilege tax upon any person" in § 4 of Act No. 406 was in itself authority to collect such a tax. Cf., *Syracuse Trust Co. v. Board of Supervisors*, 13 N.Y.S.2d 390 (Sup.Ct.), *affirmed*, 258 A.D. 17, 15 N.Y.S.2d 920 (1939); to "levy" is to "collect" a tax. *Black's Law Dictionary* (5th ed. 1979) at 816.

Let the judgment be affirmed.

Affirmed.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES and ADAMS, JJ., concur.

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions.** Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 (334) 242-4621), or any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter.***

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority

v.

Jason Richards, et al.

Appeal from Jefferson Circuit Court (CV-92-3191)

(Filed March 31, 1995)

ALMON, JUSTICE.

This appeal by permission is from the denial of a summary judgment in a declaratory judgment action brought on behalf of two classes of taxpayers against Jefferson County. The taxpayers sought to have Act 406, 1967 Ala. Acts, and Jefferson County Ordinance 1120, adopted in 1987, declared unconstitutional. Act 406 authorizes the Jefferson County Commission to levy a county occupational tax on all persons who earn wages in the County and who are not required to pay the state

business license tax. Ordinance 1120 levies the county occupational tax at the rate of .005 (1/2 of 1%) on all eligible income earned in the county, exempting persons who pay the state business license tax and domestic servants employed in private homes. The complaint was filed by two classes of taxpayers: the "Foley-Dykes" class, which represents all Federal employees subject to the tax, and the "Richards-Hill" class, which represents all non-Federal employees subject to the tax. The complaint alleges that Act 406 and Ordinance 1120 violate the equal protection and due process provisions of the Federal and State constitutions, and, with regard to the class of Federal employees only, the Buck Act, 4 U.S.C. § 111 et seq. The plaintiffs allege that the Act and the ordinance are made unconstitutional by what they call the arbitrary and irrational character of the exemptions. The Birmingham-Jefferson Civic Center Authority ("BJCC") was allowed to intervene, asserting as its interest $10 million per year of occupational tax proceeds that have been pledged to the BJCC for a 20-year period to repay BJCC special tax bonds that are now outstanding in the principal amount of over $123 million.

The County moved for a summary judgment, contending that all of the claims, except for the Federal employees' Buck Act claim, are barred by the doctrine of *res judicata*, based on the action that was the subject of this Court's opinion in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). The trial court entered a summary judgment for the County on all State constitutional claims, but denied the motion for summary judgment with regard to the Federal constitutional and statutory claims, stating:

> "In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner."

Pursuant to Rule 5, Ala. R. App. we granted the County permission to appeal the denial of the summary judgment. The issue before us is whether the trial court correctly held that the Federal constitutional claims are not barred by the doctrine of *res judicata* and thus correctly denied the summary judgment on these claims.

The doctrine of *res judicata* is a well-established principle of law:

> "The elements of *res judicata*, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987)."

Dairyland Insurance Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990).

> "If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."

Id.; Crutcher v. Wynn, 591 So. 2d 453, 454 (Ala. 1991); *Ex parte McCracken*, 576 So. 2d 664, 665 (Ala. 1991); *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138, 140 (Ala. 1989); *Trimble v. Bramco Products, Inc.*, 351 So. 2d 1357 (Ala. 1977).

> "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

Heiser v. Woodruff, 327 U.S. 726, 735 (1946) (citations omitted).

The appeal in *Bedingfield* arose from two complaints that were consolidated in a single action. One complaint was filed by Hoyt Bedingfield, Jr., individually as a taxpayer, and also in his capacity as acting director of finance of the City of Birmingham, and by the City of Birmingham. The Bedingfield/Birmingham complaint requested a judgment declaring

> "that Ordinance No. 1120 adopted by the Jefferson County Commission is void or invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County."

Among the grounds alleged in that complaint were that "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution," and that "Act 406 is vague and ambiguous and

therefore is a violation of the due process requirements of the state and federal constitution."

The second complaint sought declaratory and injunctive relief "against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County." It was filed by three persons "in their individual capacity" as "employees within Jefferson County." In addition to several other allegations of violations of due process and equal protection principles, the complaint alleged that the tax

> "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*"

(Emphasis added.) This allegation is the substance of the allegations made in the complaint now before the Court.

The complaint that is the subject of this appeal asks the circuit court to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the United States and Alabama Constitutions. The same cause of action was presented in both actions. Both were actions for declaratory judgments challenging the constitutionality of the Jefferson County occupational tax. Both complaints alleged violations of the equal protection and due process provisions of the State and Federal constitutions. The appellate briefs in *Bedingfield* argued an equal protection issue regarding the fact that Act No. 406 applied only to counties with a population of 500,000 or more. *Bedingfield* was decided, both by the circuit court

and by this Court, on other State constitutional grounds, but the Federal and State equal protection and due process claims were pleaded, and it is at least true that they "could have been adjudicated." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Furthermore, they arguably *were* adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed.

"*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990) (citations omitted).

> " '[A] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds on which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' *Baltimore Steamship Company v. Vernon Philips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed.2d 1069] (1926)."

Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764, 768 (Ala. 1981) (per Jones, J., with three Justices concurring and two Justices concurring in the result).

The only other element of *res judicata* that is at issue is "substantial identity of the parties," *see Dairyland, supra*.

> "The second set of persons to whom *res judicata* applies is composed of those persons who are or were in privity with the parties to the original

> suit. . . . Privity is defined as 'a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.' . . . Privity exists where the nonparty's interests were represented adequately by the party in the original suit. . . . Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' *United Merchants & Mfrs., Inc. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)."

NAACP v. Hunt, supra, at 1560-61 (citations omitted). *See also Century 21, supra*. The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned – they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the civic center. The motion continues:

> "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax [at] issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00

> beginning in the year 1989 and ending in the year 2008."

In 1989, the county and the Authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the bondholders.

For the foregoing reasons, we conclude that the circuit court incorrectly held that *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). did not, by the operation of the doctrine of *res judicata*, bar this action.

REVERSED AND REMANDED.

Shores, Kennedy, Cook, and Butts,* JJ., concur.

Maddox, J., dissents.

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al.

MADDOX, JUSTICE (dissenting).

The elements of the doctrine of res judicata have been precisely set out by this Court in *Wheeler v. First*

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* Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

Alabama Bank of Birmingham, 364 So. 2d 1190, 1199 (Ala. 1978), where this Court said:

> "The elements of res judicata are as follows: (1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

See also *Dominey v. Mathison*, 292 Ala. 293, 293 So. 2d 472 (1974), and my dissenting opinion in *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala. 1981). Even a cursory examination of this doctrine as applied to the facts of this case reveals that it has no application to this case. In this dissent, I will make a brief statement of the facts and will state the principle of law I think should be applied to sustain the trial court's order.

The majority holds that these plaintiffs are bound by the judgment rendered in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), where the City of Birmingham challenged the constitutionality of Act No. 406 and the validity of a county ordinance establishing an occupational tax.

The trial judge, in denying the defendant's motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata*), issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson

County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees." I agree with the trial court on both points.

In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the *res judicata* doctrine is so easily satisfied, then it could be extended *ad infinitum* and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claim similar to them. The West Publishing Company synopsis in *Bedingfield* succinctly states what that case was about, and the issues it adjudicated:

> "City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax."

527 So. 2d at 1270. Where in the *Bedingfield* opinion is there an adjudication of the federal constitutional claims the plaintiffs raise in the instant action? Neither the order of the trial judge nor the opinion of this Court contains a single reference to whether the Act and the county ordinance violate any provision of the Federal Constitution.

It is true that the plaintiffs, in *Bedingfield*, did allege in their complaint that "[i]f Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:. . . . B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitutions." But I ask this question: Is the mere making of such an allegation in a complaint sufficient to satisfy the "same cause of action presented in both suits" element of the *res judicata* doctrine? I think not, especially when the adjudicatory

orders of the trial court, and of this Court, affirmatively show that the issues in *Bedingfield* involved whether Act No. 406 was a general law or was a local law because the Act was applicable only to counties with a population of 500,000 or more.

But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the *exemption scheme* contained in. Ordinance 1120, which exempts a number of occupations from the occupational tax.[1] Clearly, that claim was not presented or adjudicated in *Bedingfield*.

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[1] Ordinance 1120 taxes the gross receipts of any person who engages in or follows any "vocation, occupation, calling and profession," but exempts from its definition of "vocation, occupation, calling and profession" the following: utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine, and comptometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply, and mining supply brokers and agents; broom, brush, and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette, and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers, and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons

Jefferson County and BJCC argue that even if the plaintiffs' claims were not previously raised or

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engaged in discounting notes, mortgages, and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; domestic servants employed in private homes; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers; palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, and dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lighting rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists, and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; operators of pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe, and cafeteria operators; operators of roadhouses, nightclubs, and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville, and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery,

adjudicated in the *Bedingfield* case, the claims are barred, nevertheless, because "any claim that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Stated differently, the County and BJCC contend that the theory on which the plaintiffs bring this action could have been asserted in the *Bedingfield* case and that this action is therefore due to be dismissed.

The test for determining whether two cases involve substantially the same cause of action is whether the same evidence would support a recovery in both actions. *Barber v. Fields*, 624 So. 2d 532, 536 (Ala. 1993); *Vaughan v. Barr*, 600 So. 2d 994, 996 (Ala. 1992); *Waters v. Jolly*, 582 So. 2d 1048, 1053 (Ala. 1991); *Garris v. South Alabama Production Credit Ass'n*, 537 So. 2d 911, 914 (Ala. 1989); *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054-55 (Ala. 1984); *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1200 (Ala. 1978). In *Barber v. Fields*, this Court reversed a summary judgment entered on *res judicata* grounds where both the former and the latter cases involved the city water service but the claims in the latter case, which pertained to the removal of water meters, was not litigated in the former case, which involved a claim that the

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and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors, and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers. See Ordinance 1120, § 1(B) and § 2; §§ 40-12-40 through 40-12-180, § 40-12-50, §§ 40-12-52 through 40-12-55, §§ 40-12-57 through 40-12-60, § 40-16-6, and § 27-4-9, Ala. Code 1975.

city's refusal to extend water service to the plaintiff's land was a violation of her right to equal protection of the laws. Barber, 624 So. 2d at 536. In *Vaughan v. Barr*, this Court reversed a judgment entered on *res judicata* grounds where both the former case and the latter case involved the same land and landowners but the former case, which involved a boundary dispute, was "based on different theories" and "require[d] different evidence" from that required in the latter case, which involved a claim of an easement by necessity. *Vaughan*, 600 So. 2d at 996.

Although this case and the *Bedingfield* case involve Act 406 and Ordinance 1120, the similarity there ends, because the evidence necessary to prove the claims asserted in this case, and the legal arguments in support of those claims, will be very different from those in *Bedingfield*. Here, the plaintiffs allege that the exemptions to the tax violate their equal protection rights under the Federal Constitution. The Federal employees are permitted to maintain their Buck Act claims. How are their claims different from those of the non-Federal employees who claim equal protection violations? In each case, the plaintiffs apparently are citizens of the United States who are claiming protection of their rights under Federal constitutional and statutory provisions. The foundation of their claims, the Federal Constitution, is the same.

I have carefully examined the arguments of Jefferson County and those of BJCC, and I recognize the importance of this case to those entities, but I think the law is against them. The plaintiffs' claims in this case are just different from those presented in *Bedingfield*, and the evidence necessary to prove their claims will be very

different from the evidence used to prove the claims asserted in *Bedingfield*. In fact, the issues presented in *Bedingfield* were largely legal issues relating to the classification between counties of 500,000 or more in population and counties of less than 500,000 in population and to the question of whether Act 406 violated the Alabama Constitution, and there is no mention in *Bedingfield* of any Federal constitutional claims adjudicated in either the trial court or this Court.

Based on the foregoing, I believe that the fourth element of the doctrine of *res judicata* as set forth in *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) ("the same cause of action presented in both suits"), is not present in this case; I believe that the trial judge correct [sic] concluded that the plaintiffs could maintain their action.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	CIVIL ACTION NO. CV-92-03191
PLAINTIFFS,	
VS.	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	
DEFENDANTS.	

ORDER

(Filed Apr. 9, 1993)

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987], imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees.

3. The trial court in *Beddingfield* [sic] *v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be

"invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987.)

Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary Judgment is DENIED as to Counts One and Two.

Done and Ordered this 8th day of April, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

Floyd PEDDYCOART et al., Mrs. Peggy J. Salamone, etc., Robert Lee McKinnon, Sr., etc., Roger Dale Crocker and Richard Lambert et al.

v.

CITY OF BIRMINGHAM.

S.C. 2552, S.C. 2662, S.C. 2731, S.C. 2356 and S.C. 2729.

Supreme Court of Alabama.

Jan. 13, 1978.

Rehearing Denied Feb. 10, 1978.

Five plaintiffs filed separate tort actions against city. The Circuit Court, Jefferson County, Thomas E. Huey, Jr., and Josh Mullins, JJ., granted city's motions to dismiss actions based upon governmental immunity under statute and plaintiffs appealed. Appeals were consolidated. The Supreme Court, Beatty, J., held that: (1) the statute granting governmental immunity only to the largest city in the largest county in the state is unconstitutional under both the Federal and the State Constitutions; it violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application, and (2) population classification cannot be utilized in the future to avoid the definition of a local act, and henceforth, when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it.

Reversed and remanded.

Torbert, C. J., concurred specially and filed opinion.

Bloodworth, J., concurred in part, dissented in part and filed opinion.

W. Eugene Rutledge of Rutledge, Williams, Williams & Norton, Anniston, for appellants Mrs. Peggy J. Salamone, who sues in her capacity as the mother of Michael A. Salamone, a 17-year old minor child, Robert Lee McKinnon, Sr., as Administrator of the Estate of Robert Lee McKinnon, Jr., deceased, and amicus curiae, Peggy J. Salamone as appellant in the case of Mrs. Peggy J. Salamone, who sues in her capacity as the mother of Michael A. Salamone, deceased, a 17-year old minor child v. The City of Birmingham, (appellee).

Mike W. McCormick, Birmingham, for appellant Roger Dale Crocker.

Roger M. Monroe of Jones & Monroe, Birmingham, for appellants Richard Lambert et al., and Floyd Peddycoart et al.

Milford G. Bass, Jr., Birmingham, for City of Birmingham, appellee.

BEATTY, Justice.

This is a consolidated appeal by five plaintiffs who filed tort actions against the City of Birmingham. In each case the trial court granted a motion to dismiss based upon a plea of governmental immunity under Tit. 62, § 660, *Alabama Code* (Recomp. 1958):

> The city shall not be liable in damages for personal injuries or damage to personal property by reason of any act or omission done or

> omitted in the exercise of its governmental functions or failure to exercise such functions; provided, however, that this provision shall not be construed to prohibit or limit the recovery of damages for personal injuries arising out of defects in highways as now provided or allowed by law.

The plaintiffs have placed in issue the constitutionality of that statute under both the state and federal Constitutions. It is contended that § 660 is a local Act notwithstanding the fact that in its original form, Act 257, § 13, Acts of Alabama, Regular Session 1915, it bore a minimum population classification of 100,000. The plaintiffs argue that this section is constitutionally offensive under § 106 of the Alabama Constitution of 1901 because the population classification is not reasonably related to the purpose of the section, and because it permits an unequal application of the law.

Our cases have held that such a relationship must exist between the statute's purpose and the population classification established, otherwise the classification will be deemed arbitrary, *e.g., Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937). The case of *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950) reviews many of our decisions on this point, in some of which we reasoned that the circumstance of size did bear a reasonable relationship to the purpose of the legislation. But we are unable to ascertain in this case such a relation. The purpose of § 660 is to provide governmental immunity, but that immunity is to be granted only to the largest city in the largest county in the state. If there is any reasonable relationship between the grant of immunity and the size of its population as

denoted by its corporate boundaries, we are unable to perceive it. "Judicial ingenuity would exhaust itself in an effort to find any rational basis for the classification it presents." *City of Birmingham v. Moore*, 248 Ala. 422, 425, 27 So.2d 869, 872 (1946). Such a classification, moreover, arbitrarily denies to citizens the right to pursue against that city remedies for injuries to person and property resulting from the exercise of its governmental functions, while they are free to pursue those same remedies against all others, as we shall show later. This results in a denial of equal protection of the laws, United States Constitution, Article Fourteen, because it constitutes an irrational difference in the treatment of our citizens. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *accord, Comer v. City of Mobile*, 337 So.2d 742 (Ala., 1976).

We hold, therefore, that § 660 is unconstitutional under both the federal and state constitutions. It violates the equal protection principle and, because of its unreasonable population classification, it cannot qualify as a general law of local application.

It is also maintained that § 660 violates the provisions of Article 4, § 105, Alabama Constitution of 1901, in view of the earlier enactment of what is now Tit. 37, §§ 502-504, *Alabama Code* (now § 11-47-190-192, *Code of Ala.* 1975);

> No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless said injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer or employe[e] of the municipality engaged in work therefor and while acting in the line of his duty, or unless the said injury or

wrong was done or suffered through the neglect, carelessness or failure to remedy some defect in the streets, alleys, public ways, or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body and whenever the city or town shall be made liable to an action for damages by reason of the unauthorized or wrongful acts, or the negligence, carelessness or unskillfulness of any person or corporation, then such person or corporation shall be liable to an action on the same account by the party so injured.

Article 4, § 105, Alabama Constitution of 1901 mandates that:

> [N]o . . . local law, . . . shall be enacted in any case which is provided for by a general law, . . . nor shall the legislature indirectly enact any . . . local law by the partial repeal of a general law.
>
> The Alabama Constitution, § 110, defines a general law as one "which applies to the whole state," and a local law as one "which applies to any political subdivision or subdivisions . . . less than the whole; . . . "

If the interpretation of § 105 were being addressed presently for the first time it would be less onerous to give a literal meaning to the language used. We are faced with a more difficult task, however, in view of the numerous instances in the past in which this Court has approved local enactments on subjects already covered

by general acts, *e.g., Dudley v. Birmingham Ry., Light & Power Co.*, 139 Ala. 453, 36 So. 700 (1903); *Brandon v. Askew*, 172 Ala. 160, 54 So. 605, 607 (1911); *Board of Revenue v. Kayser*, 205 Ala. 289, 88 So. 19 (1921); *Mathis v. State*, 280 Ala. 16, 189 So.2d 564 (1966); *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1955); *State ex rel. Jones v. Steele*, 263 Ala. 16, 81 So.2d 542 (1955); *Malone v. State*, 46 Ala.App. 363, 242 So.2d 409 (1970).

With conscious regard to the doctrine of *stare decisis et non quieta movere*, nevertheless our duty is to apply the highest law in our state as conscientiously as our abilities allow, even though this application runs counter to reasons which heretofore have been espoused for opposite views. In so doing we perform only our judicial function and do not encroach upon the separation of powers doctrine which makes the legislative branch supreme in legislative matters. Indeed, in performing that duty we only re-assert the axiom of the supremacy of our organic law over all branches of government. *State Docks Commission v. State ex rel. Cummings*, 227 Ala. 414, 150 So. 345 (1933). If we entertained any doubt upon the meaning of § 105, we would, of course, accord a weighty consideration to the legislative interpretation which has been manifested through the years by the passage of numerous local laws on subjects already affecting those localities through general laws. *Jansen v. State ex rel. Downing*, 273 Ala. 166, 137 So.2d 47 (1962). But the fact that a class of statutes has been in existence for a long time and considered constitutional does not prevent this Court from declaring them unconstitutional. *Sadler v. Langham*, 34 Ala. 311 (1859). If a legislative act is repugnant to the Constitution, the courts not only have the power, but it is their duty, when the

issue is properly presented, to declare it so. *State ex rel. Bassett v. Nelson*, 210 Ala. 663, 98 So. 715 (1924); *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. 296, 27 Am.Dec. 655 (1835).

The only phrase in the pertinent portion of § 105 requiring construction is "provided for." "Provided" ordinarily signifies a condition, or a limitation, qualification, or a restraint or exception. *Stanley v. Colt*, 5 Wall. 119, 72 U.S. 119, 18 L.Ed. 502 (1886), and, in context, it may mean "of the same import." *Webster's Third International Dictionary* (G. & C. Meriam Co., 1971); *Webster's New Collegiate Dictionary* (G. & C. Meriam Co., 1973); Abbott, *Dictionary of Terms and Phrases* (Little, Brown & Co., 1879). When we see the phrase "provided for" preceded by the words "No . . . local law," we are bound to consider the phrase as one of restraint and limitation pertaining to matters of the same import dealt with in the general law. Section 105, then, is an additional constitutional proscription upon the type or kind of legislation which the legislature is allowed to enact, following as it does § 104 which also contains limitations upon the legislative power. Nothing in either section prohibits all local legislation, see §§ 106 and 107, but only that prohibited by §§ 104 and 105.

Notwithstanding the unclouded language expressed in § 105, nevertheless it has prompted a large amount of litigation, beginning as early as 1903 and continuing as late as 1976. *Dudley v. Birmingham Ry., Light & Power Co.*, 139 Ala. 453, 36 So. 700 (1903); *Parrish v. Stembridge*, 337 So.2d 754 (Ala. 1976). Historically this Court has felt it necessary to construe this language, apparently to assure that the separation of powers doctrine would not be

inhibited and that the legislative branch of state government would continue to be supreme in legislative matters. *State ex rel. Wilkinson v. Lane*, 181 Ala. 646, 62 So. 31 (1913). Thus this Court in an early case held that § 105 was intended:

> [T]o prohibit the enactment of special, private, or local laws to meet the purposes of particular cases which may be accomplished by proceedings outside of the Legislature under the provisions of general statutes enacted to meet all cases of that general character. . . . *Brandon v. Askew*, 172 Ala. 160, 54 So. 605, 607 (1911).

This explanation has been utilized in other cases, *e.g., Dunn v. Dean*, 196 Ala. 486, 495, 71 So. 709 (1914); *Walker County v. Barnett*, 247 Ala. 418, 24 So.2d 665 (1946).

Another construction was placed upon § 105 in *Board of Revenue v. Kayser*, 205 Ala. 289, 88 So. 19 (1921). In that case this Court referred to the Proceedings of the Constitutional Convention, p. 114, for an explanation by one of the commentators:

> 'Now is there any hardship [in] saying to any man, any individual, corporation or association, that if the laws of the state have already provided for your case and you can get everything you could possibly get by appealing to the Legislature, you ought not to consume the public time in trying to get the Legislature to do what has already been done for you. That is all this provision means.' . . .

Those proceedings have been recognized, of course, as proper aids in constitutional construction. *City of Montgomery v. Graham*, 255 Ala. 685, 53 So.2d 363 (1951). The

import of the explanation, however, was that § 105 was designed simply to prevent duplication in legislative enactments. This reasoning was followed in *State ex rel. Brandon v. Prince*, 199 Ala. 444, 74 So. 939 (1917) which resulted from a change in the general law regarding the selection of jurors by legislating a different procedure for Tuscaloosa County. Our Court observed:

> If we should hold that, merely because there is a general law providing for the selecting and drawing of juries for the several counties, none of its provisions can be changed by a local law, it would be tantamount to holding that a local law cannot be passed upon that subject. We do not think that this is the meaning of section 105 of the Constitution, nor that such was the intent of the Constitution framers in ordaining it.

From this recognition favoring local laws enacted on the same *subject* of the general law, it was a short judicial step to the present explanation:

> If, in the judgment of the Legislature, local needs demand additional or supplemental laws substantially different from the general law, the Legislature has power to so enact. Courts are charged with the duty to determine whether there is a substantial difference between the general and the local law, but cannot invade the legislative domain to determine whether a county should have a local law substantially different and in addition to the state law. . . . *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 235, 124 So. 523, 526 (1929).

To summarize, this Court has interpreted § 105 in at least three different ways: (1) It was intended to prevent

local laws whose purposes might be accomplished outside the legislature; (2) It was intended to prevent duplication in legislative enactments; and (3) It was not intended to prevent the enactment of a local law on a subject already covered by a general law, when the local law is substantially different from the general law.

These differences present more than a mere play on words. If the facts in *State ex rel. Brandon v. Prince, supra,* are used as an example, the legislature changed the manner of statewide jury selection by establishing a different procedure in Tuscaloosa County. While the subject-matter of jury selection was already covered by general law, it might also be said that the different procedures established by the local law created a substantial difference between the local and general laws. Likewise, in *Standard Oil Co. v. Limestone County, supra,* the legislature authorized one county to impose a gallonage tax on gasoline sales even though there was already in existence a statewide gallonage tax. That Court found that this local tax was not "the same tax" (and thus there was a substantial difference), however, it cannot be reasonably maintained that the two laws did not concern the same subject matter because each provided for a gallonage tax on gasoline sales. In neither case was duplication present because there was a substantial difference between the two due to the effect of the local law. Indeed, it may be stated that every case involving a change in a general law by a local legislative act creates a "difference" which some could describe as "substantial," and that "substantial difference" might in any case justify the conclusion, therefore, that the local law does not concern the same subject matter.

Being a limitation upon legislative authority, § 105 clearly means just the opposite of what the Court in *State ex rel. Brandon v. Prince, supra,* held that it meant. In the quotation we have noted earlier, that Court placed more emphasis upon the efficacy of local laws, and less upon that of general laws, than § 105 obviously intended to give them, for the Court stated "[i]f we should hold that, *merely* because there is a general law. . . . " 199 Ala. at 447, 74 So. at 941 (emphasis added). We do not look upon the presence of a general law upon a given subject as a bare segment, but to the contrary, its presence is *primary,* and means that a local law cannot be passed upon that subject. *By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute.*

Thus, in this case, the legislature had already enacted a statute of statewide application on the general subject of municipal immunity for torts. Title 37, §§ 502-504, making municipalities liable in tort, was originally enacted as a general law in 1907. Judicial limitation of its application was eliminated by judicial decision on July 10, 1975 when this Court overruled prior decisions construing the legislation to prohibit suits against cities when engaged in a governmental function. *Jackson v. City of Florence,* 294 Ala. 592, 320 So.2d 68 (1975). Following the enactment of this statewide statute dealing with the subject of municipal liability in tort, the precursor of the

present § 660, *i.e.,* Act 257, § 13 Acts of Alabama, Regular Session 1915, became law. That Act dealt with a subject of the same import as the 1907 Act, that is, the subject of municipal liability in tort. To be sure, in its original form it was limited to cities with populations of one hundred thousand or more according to the Federal Census. Acts bearing such population classifications in the past have been classified as statewide Acts of local application, on the theory that they would automatically apply in the future to additional territorial subdivisions as their population increased. *Masters v. Pruce,* 290 Ala. 56, 67, 274 So.2d 33 (1973) contains a list of cases involving such legislation and in which this Court held that those laws were constitutional. Even though the entire law was enacted as a statewide act of local application, clearly it was intended to apply to Birmingham (whose population we judicially know to have been 132,685 in 1910 and 178, 806 in 1920, *U.S. Bureau of the Census,* 1970, Vol. I, *Characteristics of the Population,* Part A, Sec. 1, Table 28, p. 116), and, according to Tit. 62, § 1, *Alabama Code* of 1940 (Recomp. 1958) is one applying to less than the whole state.

But the defendant insists that any objection to the character of § 660 has been resolved by subsequent legislative action and judicial opinion thereon. Specifically, we are referred to the adoption of Title 62 (including § 660) as a part of the entire *Code* of 1940 which was adopted by the legislature in a single act. In *Jenkins v. State,* 245 Ala. 159, 16 So.2d 314 (1944) this Court held that "the Code as a whole provides a system of law applicable to the [whole] state," and in *Burns v. State,* 246 Ala. 135, 19 So.2d 450, 453 (1944) this Court reiterated that conclusion by

observing "that when the Act was passed by the legislature, adopting the Code of 1940 in its entirety, a general law was enacted." Under this blanket of general statewide application of what originally were local laws, of course, we would not presently declare that § 660, or any other acts existing at that time are deficient under § 105 of the Alabama Constitution of 1901, however questionable they now appear to be. Indeed, legislation of local application adopted after these decisions may have been in response, at least in part, to such court approval.

However, we must take particular note of the fact that the body of local acts present in the *Alabama Code* of 1940 (Recomp. 1958) and enacted since that Code's original enactment were not adopted by the legislature when it enacted the *Code of Alabama* 1975. See Tables, Vol. 2, *Code of Ala.* 1975. This action removed from the statewide influence of the Code of 1940 any legislation which may follow the enactment of the Code of 1975 and which is local legislation by constitutional definition.

Therefore we respectfully direct the legislature's attention to the fact that § 110 of the Alabama Constitution mandates the definition of a local law. It is one "which applies to any political subdivision or subdivisions of the state *less than the whole*; . . . " (emphasis added). Applies when? Obviously, when it becomes law! If, when it becomes law it applies only to a subdivision of the state, it is a local law. That is the clear meaning of the language employed by our constitutional framers. In the face of this plain language, to conclude that the application of a law to less than the entire state makes no difference when a futuristic population classification is employed is to engage in sophistic reasoning. We reject

such reasoning in favor of the clear definition of a local act which is contained in the Constitution. A population classification cannot be utilized in the future to avoid the definition of a local act.

We are mindful of prior decisions which have approved enactments based upon population classifications when the classifications were found to be "substantial" where not "arbitrarily" fixed, and were based upon a "reasonable necessity" for the several classifications. *E. g., Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937). No citation of authority is necessary to demonstrate the elusive nature of such a judicial test, or to point out that a number of these cases might have been decided either way. The specificity of the constitutional framers manifested by §§ 104, 105 and 110 discloses their intent, and negates tolerance with any such tests which give to both courts and legislature such wide discretion. Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases.

With deference to those members of this Court who in the past have been concerned that such a construction would impinge upon the legislative power to enact local legislation, we must observe that such is not the case. As we have shown, our Constitution authorizes local legislation, and sets out a procedure for its enactment. Under that authorization local legislation reflecting responses to local needs may be enacted. It is only when those local

needs already have been responded to by general legislation that § 105 of our state Constitution prohibits special treatment by local law.

Because the trial court erred in granting the defendant's motions to dismiss the plaintiffs' complaints, these cases must be reversed and remanded.

REVERSED AND REMANDED.

TORBERT, C.J., concurring specially.

MADDOX, FAULKNER, JONES, ALMON, SHORES and EMBRY, JJ., concur.

BLOODWORTH, J., concurring in part, dissenting in part.

TORBERT, Chief Justice (concurring specially):

I concur in the result based upon the denial of equal protection under the law as to these plaintiffs.

As I understand the majority in its interpretation of §§ 105 and 110 of the Constitution as applied to the issues in these cases, this decision will have prospective application. That is, with respect to statutes heretofore enacted by the Legislature their constitutionality would be measured by those *elusive standards* heretofore set forth in the many decisions of this court over the past seventy years. The principle of prospective application is not of recent vintage, but was recognized by this court as early as 1890. *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532 (1890). The rule of *stare decisis* is founded upon the principle of conservatism but was never intended to prevent progress in the science of the law. Neither does the rule disregard the importance or necessity of correct

determinations of the law, nor require its perpetuated subversion.

The Legislature is now in its last regular session of the members' term of office. In order to accord that body the effect of the principle of *stare decisis* as they represent the people in legislative matters it would seem preferable to make this decision effective upon the conclusion of this regular session. This would allow time for that body to publicly advertise for passage of local legislation where permissible, undertake a careful study as to the effect of this decision, and embark on its legislative process at the beginning of its first regular session at the next term of the Legislature under this settled construction of our Constitution.

The constitutional issue as to whether any general law of local application based upon population is a local law under § 110 of the Constitution is clearly presented. That issue is now decided, and the law henceforth should be well settled. However, further judicial refinement and interpretations in other cases may well be necessary with respect to the application of § 105 prohibiting the Legislature from enacting local laws where the subject matter has been "provided for by a general law."

BLOODWORTH, Justice (concurring in part, dissenting in part.)

I concur only in so much of the Court's opinion which holds that § 660, Tit. 62, Code of 1940, is unconstitutional because it violates the equal protection clause of both the federal and state constitutions. This is as much as the Court needs to say, and as far as the Court needs to go, to decide this case, in my judgment.

Thus, I cannot join the Court in the remainder of its decision, and I respectfully dissent therefrom. For over 70 years this Court has been committed to the proposition of upholding general acts of local application. *Parrish v. Stembridge*, 337 So.2d 754 (Ala. 1976); *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 124 So. 523 (1929); *State ex rel. Crenshaw et al. v. Joseph et al.*, 175 Ala. 579, 57 So. 942 (1911); *Griffin v. Drennen et al.*, 145 Ala. 128, 40 So. 1016 (1905). I think it unwise, at this time, to depart from such settled construction.